Office-Supreme Court, U.S.
FILED
JUL 30 1985
ALEXANDER L. STEVAS,
CLERK

(1)

No. 85-169

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID L. CHAPMAN, BARBARA E. ROBERTS, DAVID V. EASTON, MICHAEL M. KALUGER, JR., DAVID C. HUNTER, MICHAEL D. FAZIO, and CHRISTOPHER L. FAIRCHILD,

Petitioners,

vs.

THE STATE BAR OF CALIFORNIA, CALIFORNIA LEGISLATIVE COUNCIL OF OLDER AMERICANS,

Respondents.

PETITION FOR WRIT OF CERTIORARI

BARBARA E. ROBERTS
DAVID L. CHAPMAN
Attorneys at Law

673 West Naomi Avenue
Arcadia, CA 91006
(818) 446-0143

Attorneys for
Petitioners

99PP

QUESTIONS PRESENTED

California Business and Professions Code sections 6210, et seq, requires that attorneys holding in trust "nominal" client funds or client funds in trust for a short period of time place those monies in interest-bearing trust accounts with all earned interest payable directly by the financial institution to the State Bar of California for distribution to legal aid agencies.

1. Does this statute and the Regulating Rules implementing it constitute an unlawful taking of property from legal clients in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Does the statute unconstitutionally treat some legal clients differently from other legal clients?

3. Is the statute an impermissible infringement upon the constitutionally-guaranteed right to counsel?

PARTIES BELOW

In addition to the parties shown in the caption, the parties below included Elizabeth Carroll (plaintiff in a companion case) and Karl Seuthe (plaintiff in this matter). Petitioners are informed that neither Ms. Carroll nor Mr. Seuthe remains interested in the matter. They have both been served with a copy of this petition (S Ct Rule 19.6).

TABLE OF CONTENTS

INDEX

Table of Authorities		iii
Jurisdictional Grounds		v
Statutory provisions		vi
Statement of the Case		2
Argument:		
1.	THE ISSUES PRESENTED IN THIS CASE ARE SIGNIFICANT AND REQUIRE RESOLUTION BY THE SUPREME COURT OF THE UNITED STATES	12
2.	AS A MANDATORY STATUTE, IT IS AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY WITHOUT COMPENSATION	15
3.	LEGAL CLIENTS REQUIRING THE USE OF A TRUST FUND ARE UNLAWFULLY TREATED UNEQUALLY FROM ALL OTHER LEGAL CLIENTS	21
CONCLUSION		31

Appendix:

Complaint for Declaratory Relief 1
Opinion of the Trial Court 8
Opinion of the Court of Appeal, entered April 4, 1985 15
Order of the California Supreme Court, entered May 2, 1985 51

TABLE OF AUTHORITIES

United States Supreme Court Cases

Armstrong v. United States, 364 U.S. 40, 4 L.Ed.2d 1554 26

Buchanan v. Warley, 245 U.S. 60, 62 L.Ed. 149 21

Garrity v. New Jersey, 385 U.S. 493, 17 L.Ed.2d 562 29

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 28

Westbrook v. Mihaly, 403 U.S. 915 26, 27

Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 10, 19

California Cases

California Chiropractic Association v. Board of Administration, 40 C.A.3d 701 26

California Federation of Teachers v. Oxnard Elementary Schools, 272 C.A.2d 514 — 27

Cotton v. Municipal Court, 59 C.A.3d 601 — 28

Danskin v. San Diego Unified School District, 28 C.2d 536 — 29

Lelande v. Lowery, 26 C.2d 224 — 22, 25

Payne v. Superior Court, 17 C.2d 908 — 30

Russian Hill Improvement Association v. Board of Permit Appeals, 44 C.A.3d 158 — 26

Serrano v. Priest, 5 C.3d 584 — 27

Syrek v. California Unemployment Insurance, 54 C.2d 519 — 29

Other Jurisdictions

Matter of Adoption of Amendments to CPR DR 9-102 IOLTA, 102 Wa.2d 1101 — 5

Matter of Interest on Trust Accounts (Fla. 1981) 402 So.2d 389. — 11, 18

Webb's Fabulous Pharmacies v. Beckwith (Fla. 1979) 374 So.2d 951 — 18

Constitutional Provisions and Statutes

Business and Professions Code, Sections 6210, et seq — passim

State Bar of California, Rules of Professional Conduct, Rule 8-101 — 21, 24, 30

United States Constitution:

Amendment V — passim

Amendment XIV — passim

OPINIONS BELOW

Carroll v. State Bar of California (1985), 4 Civ. 31635, D001363, ___ C.A.3d ___, 213 C.R.Adv. 305.

Carroll v. State Bar of California (1985, 4 Civ. 31635; D 001363) (unpublished),

JURISDICTIONAL GROUNDS

The United States Supreme Court has jurisdiction to grant certiorari in this case pursuant to Rules 17.1(b) and 17.1(c). A significant Federal question was raised in the initial complaint and has been ruled upon by the California

courts. The California courts in their ruling have misconstrued a prior, recent, decision of this Court. There is a present danger of a conflict of opinions in that a similar statute in Florida is presently being challenged in the United States District Court on the same grounds.

On May 2, 1985, the California Supreme Court issued and entered an order denying a hearing challenging the opinion of the Fourth District Court of Appeals of California, which was issued and entered April 4, 1985.

On May 6, 1985, the Fourth District Court of Appeals ordered the remittitur to the trial court to issue.

STATUTORY PROVISIONS

Challenged Statute: California Business and Professions Code section 6211:

> (a) An attorney or law firm, which in the course of the practice of law receives or disburses trust funds, shall establish and maintain an interest bearing demand trust account and shall deposit therein all client deposits that are nominal in amount or are on deposit for a short period of time. All

such client funds may be deposited in a single unsegregated account. The interest earned on all such accounts shall be paid to the State Bar of California to be used for the purposes set forth in this article.

(b) Nothing in this article shall be construed to prohibit an attorney or law firm from establishing one or more interest bearing bank accounts or other trust investments as may be permitted by the Supreme Court, within the interest or dividends earned on the accounts payable to clients for trust funds not deposited in accordance with subdivision (a).

(c) With the approval of the Supreme Court, the State Bar may formulate and enforce rules of professional conduct pertaining to the use by attorneys or law firms of interest bearing trust accounts for unsegregated client funds pursuant to this article.

(d) Nothing in this article shall be construed as affecting or impairing the

disciplinary powers and authority of the Supreme Court or of the State Bar or as modifying the statutes and rules goverining the conduct of members of the State Bar.

Other statutes and constitutional provisions pertinent hereto are:

State Bar of California, Rules of Professional Conduct, Rule 8-101:

> (A) All funds received or held for the benefit of clients by a member of the State Bar or firm of which he is a member, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled "Trust Account", "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in such other jurisdiction where there is a substantial relationship between his client or his client's business and the other jurisdiction and no funds belonging to the member of the State Bar or firm of which he is a member shall be deposited

therein or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the member of the State Bar or firm of which he is a member must be deposited therein and the portion belonging to the member of the State Bar oir firm of which he is a member must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member of the State Bar or firm of which he is a member to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A member of the State Bar shall:

(1) Promptly notify a

client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member of the State Bar and render appropriate accounts to his clkient regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the member of the State Bar which the client is entitled to receive.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1.:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

BEFORE THE

SUPREME COURT OF THE

UNITED STATES OF AMERICA

DAVID L. CHAPMAN, BARBARA E. ROBERTS, DAVID V. EASTON, MICHAEL M. KALUGER, JR., DAVID C. HUNTER, MICHAEL D. FAZIO, and CHRISTOPHER L. FAIRCHILD

Petitioners

vs.

THE STATE BAR OF CALIFCRNIA, CALIFORNIA LEGISLATIVE COUNCIL OF OLDER AMERICANS,

Respondents

PETITION FOR WRIT OF CERTIORARI

Petitioners, through their counsel, respectfully pray the Supreme Court of the United States of America issue a Writ of Certiorari and accept for hearing the within matter to determine the constitutionality of California Business and Professions Code sections 6210, et seq.

STATEMENT OF THE CASE

By legislation enacted in 1981 and effective June 1, 1983, the California Legislature enacted Business and Professions Code §§ 6210, et seq[1]. Those statutes require that all attorneys in the State of California having unsegregated client trust accounts must maintain those client funds in interest-bearing accounts with the accrued interest payable solely and directly to the State Bar of California. The interest accumulated pursuant to the statute is then to be distributed to non-profit organizations providing legal aid to the poor throughout the State.

---

[1]For convenience, the statutes will be referred to herein as "the Statute" or, in referring to the program itself, "IOLTA", as it has become known, which stands for "Interest on Lawyer Trust Accounts".

The statute applies to all client funds that are "nominal in amount or are held for a short period of time". B&P § 6210 (a).

Petitioners are a representative portion of the attorneys throughout the State of California who have formed the opinion that the statute violates basic Constitutional principles and rights of the clients whose funds are entrusted to them for various and sundry reasons.

Subsequent to enactment, under threat of discipline, the majority of practicing attorneys in California opened IOLTA accounts. According to Respondents, approximately $12,000,000.00 was accumulated from the interest on client funds through the end of 1984; some $8,000,000.00 was readied for distribution in February 1985.

Approximately 32 other states have enacted similar statutes, either through the legislative process or the rule-making power of their respective Courts. All but four (4) programs, with California included in the four, are voluntary on the part of the attorney; the earliest mandatory law is California's.

Actions in other states have been challenged, but only California has a reported decision in an adversarial proceeding. The Florida voluntary statute is presently facing challenge in the United States District Court there. A portion of that case is pending before the Eleventh Circuit Court of Appeals, but no decision has yet been rendered. Plaintiff's counsel in that action has informed petitioner's counsel that he intends to pursue the case by petition to

the United States Supreme Court if necessary.

The few reported decisions that exist on the issue are the result of the rule-making process within the respective court systems, with organized bar associations appointed to represent the various sides of the issue. (E.g., In the Matter of Adoption of Amendments to CPR DR 9-102 IOLTA, 102 WA2d. 1101)

Some states that have considered the question of voluntary vs. mandatory statutes have ruled strongly against proposed mandatory statutes, including the oft-cited Florida opinion, infra.

The state of the law nationwide is presently unclear regarding the status of these enactments with advisory opinions on the subject ranging the gamut of legal extremes. Especially since these sta-

tutes seem to be spreading from state to state, it is time for the highest court in the land to rule with finality on the propriety of this fund-raising scheme.

Shortly after receipt of notification from Respondent The State Bar of California of the statute's enactment and effective date, petitioners filed, on behalf of themselves and all others similarly situated, a Petition for Hearing with the Supreme Court of the State of California asking that Court to accept jurisdiction on the basis of its authority over the rule-making process of the State Bar of California. That Petition was denied.

An action for Declaratory Relief was then filed in the Los Angeles Superior Court (action C 455587), seeking a declaration that the statute violates both the

California and United States Constitutions. (Copy of complaint contained in Appendix, p. 1)

Shortly before the Los Angeles action was filed, a similar action was filed in the San Diego Superior Court (N22139) by a legal client seeking similar relief. On petition of The State Bar of California, the two actions were consolidated and the matter assigned to the Honorable F. V. Lopardo, Judge of the North San Diego County Superior Court.

After coordination, cross-motions for Summary Judgment were filed by all parties, argument was heard, and the cause submitted.

On November 10, 1983, Judge Lopardo issued his Statement of Intended Decision holding that to be construed constitutional, the law must be found to be

voluntary on the part of the clients depositing the money, as opposed to mandatory as urged by Respondents. The Judgment was entered December 20, 1983. On January 13, 1984, Judge Lopardo fixed the amount of attorneys' fees and costs to be awarded plaintiffs in the two cases under the "private attorney general" theory. (Copy of judgment in Appendix, p. 8)

Both Respondents appealed, and the matter was briefed, argued and submitted to the Fourth District Court of Appeal of the State of California. By decision filed and mailed December 19, 1984, the Court of Appeal, Fourth Appellate District, held that the statute is mandatory and constitutional, and that petitioners were not entitled to attorneys' fees and costs in the court below. Respondents

were awarded costs; the remittitur issued the same day.

On January 3, 1985, a Petition for Hearing was lodged with the Clerk of the Supreme Court of the State of California. The cause was remanded by that Court to the Fourth District Court of Appeal on March 14, 1985, for re-determination of the correct filing and entering dates of the decision.

By order dated April 4, 1985, the Court of Appeal on its own motion vacated the prior opinion, and filed and entered its decision on that date. (Copy of opinion in Appendix, p. 15)

Petitioners filed another Petition for Hearing before the California Supreme Court. By order dated May 2, 1985, hearing was denied. The remittitur of the Fourth District Court of Appeal was

then issued May 6, 1985.

In its written opinion, the Court of Appeal found that the clients' monies were indeed property within the meaning of the Fifth Amendment to the United States Constitution, as was the interest, but that the clients had no right to retain the interest earned on their monies. In addition, the Court held that by taking the interest, the state was only impacting an "unimportant" "abstract right" of the clients which the Court further found permissible. (Opinion, Appendix, p. 37)

Although petitioners relied upon a recent United States Supreme Court opinion which they believed factually similar[2], the Court of Appeal (as did the

---

[2]Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155

Florida Supreme Court[3]) distinguished the cases on their facts: the monies at issue for any one client under IOLTA are small; the monies at issue in Webb's were "substantial". (Opinion, Appendix, p. 40-41)

As to the equal protection argument, the Court found that the distinction between the clients to whom the law applies and those to whom it does not was a matter founded in the "contractual relationship between the lawyer and client" and not upon any act of the State. (Opinion, Appendix, p. 49)

The Federal questions have been raised at an early stage in these proceedings; they have been passed upon by the highest court within the State of

---

[3]Matter of Interest on Trust Accounts (Fla. 1981) 402 So.2d 389.

California; they are being heard in another state (Florida) on similar facts.

The Federal questions must be resolved by the United States Supreme Court, if for no other reason than the very real possibility that there will be two directly conflicting opinions on the same subject within a short period of time. Since the type of statute being challenged is proliferating, the danger of uncertainty and conflict looms large.

ARGUMENT

1. THE ISSUES PRESENTED IN THIS CASE ARE SIGNIFICANT AND REQUIRE RESOLUTION BY THE SUPREME COURT OF THE UNITED STATES

It is uncontradicted that legal aid agencies are an important component of a truly civilized, democratic society, and that funding of such services is presently in short supply. However, while a

degree of "redistribution of wealth" is an inherent power of government, such a redistribution must be kept within the bounds of constitutional strictures.

The IOLTA program as approved in the State of California, for the reasons discussed *infra*, does not pass constitutional muster. The California program, while different from the majority of IOLTA programs by its mandatory nature, is simply one example of the constitutional morass into which the well-intended have thrown the legal profession. 32 out of 50 states are now operating IOLTA programs in one form or another. Those that are mandatory are subject to challenge as California's; those that are voluntary are subject to challenge as Florida's.

This Court must itself review the

challenges for there to be resolution, if any. Other states besides California have considered the questions, but not in an adversarial proceeding, and without squarely confronting the challenges lodged. The opinions that do exist run the length and breadth of the legal spectrum in their conclusions.

Only the United States Supreme Court, as the highest tribunal in the land, can fully address the case and issues with its direct ramifications for not only the State of California, but for all other States in the Union. This case presents an opportunity for the Court to directly perform what must be its highest calling--protecting the rights of all this country's citizens and ensuring access to legal services, not just by the indigent, but those of modest and other

means as well.

2. AS A MANDATORY STATUTE, IT IS AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION

On its face the statute is an unconstitutional taking of private property without compensation in direct violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The state Court admits that the interest is property (Opinion, p. 42), but concludes that once the client surrenders the principle to the attorney, the client also surrenders all control over the money, and thus no longer has any protected right. Additionally, the Court has held that since the clients have not been damaged in any significant dollar amount, it is permissible for the State to proceed heedless of the client's

wishes. (Opinion, p. 41-43)

It is difficult to understand how turning over money to be placed in trust for safekeeping equals surrender of all rights. The attorney--the trustee--cannot simply do with the funds what he or she wishes and escape responsibility "so long as the principle is secure". Such actions would violate horn book trust law, and certainly subject the errant attorney to discipline, justifiably.

Although it is tempting, courts must avoid the trap of looking at the individual dollar amounts, observing that on their own they cannot generate interest, and then concluding that the client has lost nothing except and "unimportant" "abstract right[]". (Opinion, p. 37) It is not only unconstitutional, but inconsistent to permit Respondents to aggre-

gate the funds, thus generating net interest, while denying that opportunity to the undisputed owners of the funds, the clients. (The Opinion gives no consideration to the loss inflicted upon clients were the attorney permitted to aggregate the funds of all of his or her clients, thus generating net interest to be divided by "simple arithmetic". Opinion, p. 41)

In other words, Respondent is permitted to generate net interest (which must certainly be protected property if owned by Respondent), but attorneys are not permitted to do so on behalf of the persons to whom they owe a fiduciary duty, because the individual client's funds are "nominal" or to be held a "short period of time".

This holding is simply a restatement

of the "statute takes only what it creates" theory propounded by the Florida Supreme Court on two occasions--once in the matter of Webb's Fabulous Pharmacies v. Beckwith (Fla. 1979) 374 So.2d 951, 952-953, and again in Matter of Interest on Trust Accounts (Fla. 1981) 402 So.2d 389.

In both cases, a statute created the possibility of earning interest on funds that prior statutes had forbidden. In the former, the statute required the payment of interest on funds deposited with the court during sale of a business where the sales price was less than the outstanding liabilities. In the latter, the first IOLTA program was created as voluntary, not as the mandatory program then urged by the Florida Bar.

This Court, in a unanimous decision,

reversed the first of the cases (Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 66 L.Ed.2d 358), holding that

> [t]he earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. . . .
>
> [A] State, by ipse dixit, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.

449 U.S. at 164 (emphasis added)

The California Court distinguishes Webb's by noting the "substantial" sums involved (Opinion, p. 40). However, this case does not turn on the amount involved, nor the definition of "substantial" (which varies significantly--and substantially--from person to person depending

on circumstances). The case turns on the value of a right guaranteed by the Framers to protect against unwarranted governmental intrusion into the lives of the citizens of this new country. No right should be diminished by passage of time, nor should one ever be tied to a dollars and cents analysis.

The Court is, of course, correct in recognizing that a substantial interest may be taken at times, such as in zoning cases. (Opinion, p. 42) But in the cases cited by the Court of Appeal, all beneficial uses of the property were not removed, only some, and the remaining uses were only restricted. The IOLTA statute takes all the profit potential extant and leaves no room for earnings for the client--the undisputed owner of the fund. It is not simply a "taking",

it is purely and simply a "confiscation".

> Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property.

Buchanan v. Warley, 245 U.S. 60, 74-75, 62 L.Ed. 149, 161 (emphasis added)

3. **LEGAL CLIENTS REQUIRING THE USE OF A TRUST FUND ARE UNLAWFULLY TREATED UNEQUALLY FROM ALL OTHER LEGAL CLIENTS**

The Statute does not apply to all legal clients, only to those meeting the criteria for when funds must be held in trust (Rules of Professional Conduct, Rule 8-101) and for when the funds may be held unsegregated from the monies of other clients.

The Fourteenth Amendment to the United States Constitution provides that

there shall not be a denial of equal protection among persons of the country or state. As demonstrated *infra*, the Statute violates that mandate.

A. THERE IS NO LAWFUL DISTINCTION BETWEEN TYPES OF LEGAL CLIENTS THAT JUSTIFIES THE DISPARATE TREATMENT OF THE STATUTE

Clearly, distinctions between and among groups may lawfully be made. However, to be valid, such differences in treatment between groups must be based on some "natural, intrinsic, or constitutional distinction which reasonably justifies difference in treatment". *Lelande v. Lowery*, 26 C.2d 224, 232. When there is no rational difference between the groups, the disparate treatment may not be justified.

In the present matter, the only distinction between all legal clients and

legal clients with money in an attorney's unsegregated trust account is money and happenstance. Those clients without funds or whose case involves no transfer of monies through the attorney are not subject to the law. Those clients having large sums or whose case involves distribution of large sums or over a great period of time are not subject to the law. Only those in the middle are affected. As is apparent, the distinction is not even based on type of case, length of representation, or any other specific demarcation.

The Court of Appeal pictures the differences between clients as revolving around the "contractual relationship between the lawyer and the client, usually depending on factors unique to the type of litigation and the degree of financial

risk a lawyer is willing to assume" (Opinion, p. 49)

This misstates reality. Funds which do not belong totally to the attorney are required to be deposited into a trust account (Rules of Professional Conduct, Rule 8-101), such as personal injury settlements where the attorney's name is on the draft as payee with the client, community assets in a dissolution where distribution must be made to more than one party, potential settlement payments to a third party, etc. Depositing these funds is not a choice of the client and attorney, but a requirement of the rules by which attorneys must live.

These differences between clients to whom the law does and does not apply make no sense. They are based in many instances on happenstance and chance. Thus,

the distinctions themselves are unlawful.

Further, the group of clients to whom the statute applies bears no relationship whatsoever to the goal of the statute, a basic threshold for constitutionality.

> A law is special within the prohibitions of the California Constitution (Art. I §§ 11, 21; Art. IV § 25) [now Art. I § 7] when it is not founded on a natural, intrinsic, or constitutional distinction which reasonably justifies difference in treatment. [Citations] The Legislature can make reasonable classifications, i.e., classifications which have a substantial relationship to a legitimate object to be accommodated. [Citations] A law is general and uniform and affords equal protection in its operation when it applies equally to all persons within such a classification. [Citations]

Lelande v. Lowery, supra, 26 C.2d at 232. (Emphasis added)

The government simply may not

> forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong v. United States, 364 U.S. 40, 49.

The reverse is also true: if the difference in classes has no substantial relationship to the purpose for which the legislation is designed, the law must fail. Westbrook v. Mihaly, 2 C.3d 765, 784-785, vacated on other grounds, 1971, 403 U.S. 915; Russian Hill Improvement Association v. Board of Permit Appeals, 44 C.A.3d 158, 163; California Chiropractic Association v. Board of Administration, 40 C.A.3d 701.

> [A] law which confers particular privileges or imposes peculiar disabilities upon an arbitrarily selected class of persons who stand in precisely the same

> relation to the subject matter of the law as does the larger group from which they are segregated constitutes a special law which is tantamount to a denial of equal protection.

California Federation of Teachers v. Oxnard Elementary Schools, 272 C.A.2d 514, 527-528.

B. UNDER THE STRICT SCRUTINY TEST, THE STATE CANNOT DEMONSTRATE A COMPELLING STATE INTEREST IN THE DISPARATE TREATMENT

In areas involving "suspect" classifications or fundamental interests, the test of strict scrutiny is applied when the law is challenged, requiring the state to demonstrate a compelling state interest in the law, and that the distinctions drawn are necessary to accomplish the purpose of the law. Westbrook v. Mihaly, supra; Serrano v. Priest, 5 C.3d 584, 597.

> Legislation touches upon a fundamental interest, as that term is used in equal protection cases, when it affects rights 'explicitly or implicitly' guaranteed by the Constitution, or deprives, infringes or interferes with some fundamental personal right of liberty.

Cotton v. Municipal Court, 59 C.A.3d 601, 605-606; San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33, 37-38.

Contrary to the statements in the Opinion (p. 46), petitioners do argue that there is no rational relationship between the class affected and the goal of the statute. But even if there were a "rational relationship", that would not meet the "compelling state interest" test that must be used when a fundamental interest (here the right to counsel) is involved.

> There are rights of a constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce . . . Resort to federal courts . . . Assertion of a First Amendment freedom . . . The imposition of a burden on the exercise of a Twenty-fourth Amendment right . . . [U]se in subsequent criminal proceedings of confessions obtained under threat of removal from office . . .

Garrity v. New Jersey, 385 U.S. 493, 500, 17 L.Ed.2d 562, 567; Syrek v. California Unemployment Insurance, 54 C.2d 519; Danskin v. San Diego Unified School District, 28 C.2d 536.

To save the statute, the State must demonstrate not only a compelling state interest, and that the distinctions drawn are necessary to achieve that interest, but

> the government must show that its interest cannot be

> satisfied by alternative methods less restrictive of the individual right abridged.

Payne v. Superior Court, 17 C.2d 908, 914.

It should be noted again that both deposit of funds into a trust account generally, and into an interest-bearing account specifically, are mandatory (Rules of Professional Conduct, Rule 8-101; Regulating Rules, Rule 1). There is no provision for the client or the attorney to "opt out" of the program or designate a beneficiary of the trust interest other than the State Bar.

The client who, for whatever reasons, opposes the program morally, philosophically, or legally, has only one avenue available: to waive her or his right to counsel.

Exercise of such a fundamental, basic right should not depend on politics or philosophies. Other alternatives are available for financing the legal services programs. Those persons, however many they may be, and_even_if_just_one, who forego their right to legal counsel rather than be forced to participate in the program are as surely and certainly denied access to legal services as the indigent persons the program was designed to assist. The rights of one group should certainly not be protected at the expense of the other.

As an unconscionable, unjustifiable burden on the fundamental right to counsel, the statute and Rules must fail.

CONCLUSION

Based on the foregoing, petitioners urge this Court to accept the matter for

hearing and to enforce the Constitution of the United States by declaring California Business & Professions Code sections 6210, et seq, unconstitutional.

Respectfully submitted,

Barbara E. Roberts

Barbara E. Roberts
Attorneys for Petitioners

A P P E N D I X

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

KARL SEUTHE; DAVID L. CHAPMAN; BARBARA E. ROBERTS; DAVID V. EASTON; MICHAEL M. KALUGER, JR.; DAVID C. HUNTER; MICHAEL D. FAZIO; and CHRISTOPHER L. FAIRCHILD, individually and as class representatives, Plaintiffs -vs- STATE BAR OF CALIFORNIA Defendants	NO. C455587 COMPLAINT FOR DECLARATORY RELIEF, PRELIMINARY AND PERMANENT INJUNCTIONS

Plaintiffs allege:

1. Each Plaintiff is a duly admitted and active member in good standing of the State Bar of California, Defendant herein. Each Plaintiff further is a Trustee for unsegregated client trust funds as those funds are defined and regulated pursuant to State Bar of

California Rules of Professional Conduct, Rule 8-101 (hereinafter Rules of Professional Conduct).

2. Each Plaintiff appears individually and on behalf of all other persons similarly situated, to wit: active members of the State Bar of California with responsibilities as Trustee for unsegregated client trust funds.

3. Defendant, the State Bar of California, is a public corporation, duly created and existing pursuant to Article VI, Section 9, of the Constitution of the State of California, and Section 6001, et seq, of the Business and Professions Code of the State of California. The governing body of Defendant is its Board of Governors.

4. One of the primary legislated functions of Defendant is the discipline

of attorneys who violate the Rules of Professional Conduct. The powers of Defendant, subject to review by the Supreme Court of the State of California, extend from private reproval and reprimand, to disbarment and denial of the right to continue to practice law in this state.

5. Defendant has communicated to Plaintiffs and the class they seek to represent, advising them of the enactment of 1981 Senate Bill 713, chaptered as Article 14 of Chapter 4, Division 3 (sections 6210, et seq) of the Business and Professions Code (hereinafter "the Statute"). The Statute provides that all active members of the State Bar of California acting as Trustees for unsegregated client trust funds are required to maintain such funds in an

interest-bearing account. The Statute further provides that all interest earned on the funds shall be delivered to Defendant who shall then distribute the funds to itself for the actual administrative costs of the program and to "qualified legal services projects". The "qualified legal services projects" intended to be recipients of the funds thus generated are non-profit corporations providing free legal services to indigent persons within the state of California.

6. At the time of the above notification, Defendant further advised Plaintiffs of the Regulating Rules adopted pursuant to the Statute. These rules provide, *inter alia*, that Plaintiffs must notify Defendant not later than May 31, 1983, of the name and

address of the bank or other financial institution holding said funds, the account number into which the funds are to be deposited, and the name and State Bar number of each attorney acting as Trustee of said funds.

7. As Trustees for said funds, Plaintiffs and all others similarly situated have a non-delegable duty to insure that all trust funds are accounted for and disbursed in strict compliance with the clients' instructions and the laws of this state and the United States of America.

8. Plaintiffs are informed and believe and thereon allege that the Statute and Regulating Rules violate the United States Constitution and the Constitution of the State of California. Plaintiffs are further informed and believe and

thereon allege that irreparable harm will be incurred unless enforcement of the Statute and Regulating Rules is enjoined and restrained pending resolution of this action, in that should Plaintiffs fail to comply with the Statute and REgulating Rules, they will be subjecting themselves to the possibility of disciplinary action but should they comply with the Statute and Regulating Rules, they will be subjecting themselves to valid claims of their clients for failing to disburse the trust funds only lawfully and in accordance with the clients' instructions.

9. Plaintiffs further allege that in bringing this proceeding and diligently pursuing the relief requested, they are conferring a benefit to members of the general public such that attorneys' fees

and costs should be awarded Plaintiffs against Defendant at the conclusion hereof.

WHEREFORE, Plaintiffs pray that this Court declare the Statute and REgulating Rules are unlawful and unconstitutional, that the court enjoin, preliminarily and permanently, enforcement of the Statute and Regulating Rules, and that Plaintiffs be awarded attorneys' fees and costs for the prosecution of this action.

Dated: June 6, 1983

Barbara E. Roberts
Attorney for Plaintiffs

(verification)

Filed December 20, 1983
Robert D. Zumwalt, Clerk
By J. Lange

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

LEGAL SERVICES TRUST ACCOUNT CASES	)	Coordination No 1735
Coordinated actions:	)	
ELIZABETH CARROLL	)	SAN DIEGO SUPERIOR CT
v.	)	NO. N 22139
STATE BAR OF CALIFORNIA	)	
SEUTHE, et al.,	)	LOS ANGELES SUPERIOR CT
v.	)	NO. C 455587
STATE BAR OF CALIFORNIA	)	JUDGMENT

On November 4, 1983, a hearing was held on the following duly noticed motions:

1. C 455587, Plaintiffs' Motion for Class Certification;

2. N 22139, Plaintiff's Motion for

Summary Judgment;

3. C 455587, Plaintiffs' Motions for Summary Judgment and for Permanent Injunction;

4. Defendant State Bar's Cross-Motions for Summary Judgment and Request for Judicial Notice pursuant to Evidence Code section 454(d) and 453;

5. Intervenors' Cross-Motions for Summary Judgment.

Attorneys Charles C. Renshaw and Carla DeDominicis appeared for Plaintiff Carroll, attorneys Barbara E. Roberts and David L. Chapman appeared for Plaintiffs' Seuthe, et al., attorneys Herbert M. Rosenthal, Charles S. Vogel and Margaret R. Dollbaum appeared for Defendant State Bar, and attorneys Ralph S. Abascal and Gregory E. Knoll appeared for Intervenors.

By stipulation of the parties, the Court deferred the hearing on the issue of class certification in C 455587 and proceeded to hear solely the constitutional challenge to the Statute and REgulating Rules filed by the Plaintiffs in the coordinated actions.

The parties stated in their moving and responding motions and Points and Authorities that there were no triable issues of fact in dispute; the issues were matters of law and appropriately resolved by way of Motions for Summary Judgment pursuant to Code of Civil Procedure section 437c. The Court agrees that there are no questions of fact in dispute.

The Court took the matter under submission and on November 10, 1983, mailed its Tentative Decision to all

parties.

Defendant State Bar filed objections to said Tentative Decision. A hearing was held on said objections on December 9, 1983;

Attorneys Herbert M. Rosenthal and Charles S. Vogel appeared for Defendant State Bar, attorney Gregory E. Knoll appeared for Intervenors, attorneys Charles C. Renshaw and Carla DeDominicis appeared for Plaintiff Carroll, and attorney David L. Chapman appeared for Plaintiffs Seuthe, et al.. After argument by counsel, the Court took the matter under submission.

IT IS THE JUDGMENT OF THIS COURT THAT:

1. The Plaintiffs have standing to file this action and there is existing a justiciable controversy between the Plaintiffs and the Defendant State Bar.

2. The Motions for Summary Judgment by Plaintiff Carroll and Plaintiffs Seuthe, et al., be and they are, granted; the Court declares that:

(a) The Program established by Business & Professions Code section 6210 et seq. and the Regulating Rules promulgated thereunder is voluntary in that a client has the right to choose in writing to deposit funds that are nominal in amount or are to be on deposit for a short period of time in an account pursuant to Business & Professions Code section 6211(b) and Regulating Rule 1.4;

(b) In the event that the client fails to make such choice pursuant to Business & Professions Code section 6211(b), it is mandatory that the client's attorney who receives such funds that are nominal in amount or are to be

on deposit for a short period of time place such funds in an account pursuant to 6211(a) of the Business & Professions Code.

(c) It is the responsibility of the attorney to determine whether client funds received by the attorney for the benefit of the client are nominal in amount or are to be held for a short period of time as defined in the subject Statute and Regulating Rules.

(d) Business & Professions Code sections 6210 et seq. to provide "Funds for the Provision of Legal Services to Indigent Persons" and the Regulating Rules promulgated thereunder as construed herein are constitutional.

3. All other motions are denied.

4. Plaintiffs, by the prosecution of these coordinated actions, have

conferred a substantial benefit on the general public by seeking the resolution of the controversies existing between the Plaintiffs and Defendant in the interpretation and construction of these Statutes and Regulating Rules.

5. Plaintiffs are entitled to recover reasonable attorneys' fees and costs for the prosecution of these coordinated actions.

Dated: December 20, 1983

F. V. LOPARDO
JUDGE OF THE SUPERIOR COURT

CERTIFIED FOR PUBLICATION

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ELIZABETH CARROLL,	)	D 001363
	)	4 Civ.
Plaintiff/Respondent	)	No. 31635
	)	
v.	)	San Diego
	)	Superior Ct
STATE BAR OF CALIFORNIA	)	No. N 22139
	)	
Defendant/Appellant	)	
----------	)	
	)	
KARL SEUTHE, et al.,	)	
	)	
Plaintiffs/Respondents	)	
	)	
v.	)	Los Angeles
	)	Superior Ct
STATE BAR OF CALIFORNIA	)	No. C455587
	)	
Defendant/Appellant	)	
----------	)	
CALIFORNIA LEGISLATIVE COUNCIL OF OLDER AMERICANS, et al,	)	
	)	
Intervenors/Appellants	)	
----------	)	

APPEAL from a judgment of the Superior Court of San Diego County, F. V. Lopardo, Judge. Reversed.

Sidley & Austin, Charles S. Vogel, Margaret R. Dollbaum, Robert I. McMurry, Herbert M. Rosenthal, and Lawrence C. Yee for Defendant and Appellant.

Morrison & Foerster, Robert D. Raven, Jack W. Londen, Peter M. Siegel, Randall C. Berg, Jr., and Arthur J. England, Jr., Amici Curiae on behalf of Defendant and Appellant.

Charles C. Renshaw, Barbara E. Roberts and David L. Chapman for Plaintiffs and Respondents.

Ralph Santiago Abascal, Peter H. Reid, Robert J. Cohen and Gregory Knoll for Intervener.

The State Bar of California appeals a judgment declaring The Funds for the

Provision of Legal Services to the Indigent Act [1] establishes a voluntary, rather than mandatory, program for depositing nominal and/or short-term client trust funds in an aggregated account from which the interest shall be used to fund approved indigent legal services. We find the relevant statute, Business and Professions Code [2] section 6211, subdivision (a), is plain, clear and unambiguous, prescribing a mandatory disposition of client trust funds which, because they are minimal in amount or are to be held for only a short time, cannot be deposited or invested to earn net income for the client. We then resolve

---

[1]Business and Professions Code, section 6210, et seq.

[2]All statutory references are to the Business and Professions Code unless otherwise specified.

and reject the several constitutional issues raised, but not addressed by the trial court. We reverse.

HISTORICAL PERSPECTIVE

Programs, such as that authorized by section 6211, subdivision (a) authorizing pooling nominal, short-term client deposits to generate interest income for indigent service funding are generally referred to by the acronym "IOLTA" (Interest on Lawyer Trust Account Program). In concept, IOLTA's are designed to allow client trust funds which cannot be placed at interest to generate net income for the client, to be pooled in an aggregated interest-bearing account, the total income of which is unconditionally designated for a specified charity.

Thirty-two states have adopted IOLTA

programs. California, Connecticut, Maryland and New York enacted their programs through legislation. The other states established programs through Supreme Court approval of state bar resolutions, most without formal opinion.

Every IOLTA established to date facially denies the client whose nominal trust fund is involved, from exercising any control over where, how or if the money is to be deposited after delivery to the lawyer, and does not allow the client any discretion as to how the interest earned is to be used. All but four states permit only the lawyer the option not to participate in these programs. The Arizona, Minnesota and Washington IOLTA mandate the lawyers' participation. Whether the Act requires, or only permits, California clients and

their lawyer to deposit nominal, short-term trust funds in IOLTA accounts, is the first question we must address. Our inquiry requires a brief explanation of previous restrictions on use of client trust funds.

Historically, interest on bank deposits could be generated only on accounts having time restrictions on the right to withdraw (time accounts). "Demand accounts," those permitting withdrawals on demand, were regulated to prohibit the bearing of interest. The Consumer Checking Equity Act of 1980, title III of the Depository Institutions Deregulation and Monetary Control Act of 1980, Public Law 96-221, section 303, 94 Statutes 146 (1980) codified at 12 U.S.C. section 1832 (a) (1982), permitted negotiable order of withdrawal (NOW)

accounts allowing demand withdrawal and interest. However, NOW accounts are limited to funds in which the entire beneficial interest is held by persons or organizations operated primarily for religious, philanthropic, charitable, educational or other similar purposes and not for profit, or of funds belonging to public entities. Thus, two barriers prevented a client's nominal or short-term trust funds from being productions for the client; economics and the long history of restrictions on the ability of bank customers to earn interest on demand deposits and the current NOW banking restrictions. By providing that income produced by an IOLTA NOW account be paid to a nonprofit charitable corporation or public entity, section 6211, subdivision (a) overcomes the banking law barrier.

The economic barrier is also removed because the pool can produce aggregate income net of expenses. Thus, with or without IOLTA, the client realizes no income.

SECTION 6211 REQUIRES ALL NOMINAL, SHORT-TERM TRUST FUNDS BE PLACED IN AN AGGREGATED ACCOUNT WITH INTEREST PAYABLE TO THE APPROVED INDIGENT LEGAL SERVICES

The trial court interpreted section 6211, section (b)[3] as permitting lawyers to deposit nominal, short-term trust funds in interest-bearing accounts other than the IOLTA authorized by section 6211, subdivision (a) at the request of

---

[3]Subdivision (b) states: "Nothing in this article shall be construed to prohibit an attorney or law firm from establishing one or more interestbearing bank accounts or other trust investments as may be permitted by the Supreme Court, with the interest or dividends earned on accounts payable to clients for trust funds not deposited in accordance with subdivision (a)". (Italics added.)

the client. We hold subdivision (b) plainly applies only to monies not nominal in amount or deposited for short term, i.e., to funds which may be segregated to earn net income for the benefit of a client. Section 6211, subdivision (a) is all inclusive. It states: "An attorney or law firm, which in the course of the practice of law receives or disburses trust funds, shall establish and maintain an interest-bearing demand trust account and shall deposit therein all client deposits that are nominal in amount or are on deposit for a short period of time." (Italics added.)

It is fundamental "the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (Select Base Materials v. Board

of Equal., 51 Cal.2d 640, 645; California Teachers Assn. v. San Diego Community College Dist., 28 Cal.3d 692, 698; Moyer v. Workmen's Comp. Appeals Bd., 10 Cal.3d 222, 230.) We first look to the language of the statute, give effect to its usual import, and avoid making any language mere surplusage and attempt to harmonize a particular clause of a section in the context of the statutory framework as a whole. (Ibid.)

Because we find subdivision (a)'s language is clear and unambiguous, there is no need for statutory construction. (See Tiernan v. Trustees of Cal. State University & Colleges, 33 Cal.3d 211, 218.) It requires nominal or short-term deposits of client trust funds be placed in an interest-bearing trust account and any interest earned by used to fund

designated, specified legal services. Every nominal or short-term account is included within the disposition mandated by section 6211, subdivision (a) and that section permits no discretion to use the interest earned on those deposits for any purpose other than to fund the designated legal services. It follows that any alternative disposition authorized under section 6211, subdivision (b) applies only to client deposits which are not nominal or short term.

The trial court's construction would allow clients to control the disposition of interest earned on their short-term or nominal trust deposits. It reasoned that section 6211, subdivision (b) allows a client the right to receive interest earned on trust funds not deposited in accordance with subdivision (a), and a

client whose deposits are placed in interest-bearing accounts other than those referred to in subdivision (a) may elect to receive interest from those accounts personally or give it to a designated charity. It then interpreted Article Fourteen and the State Bar Guidelines (see infra) as giving a client the right to choose whether to deposit all monies, including nominal or short-term deposits in an account pursuant to section 6211, subdivision (b) and, should the client fail to choose a section 6211, subdivision (b) deposit, the funds shall be placed in a section 6211, subdivision (a) account. However, under that interpretation, a client's silence is, in effect, a choice to put the funds in a section 6211, subdivision (a) account and impliedly designates the legal services

programs to receive the interest earned. Such a passive role would be deemed an election to assign income.

The court should not rewrite legislation to avoid constitutional questions if doing so subverts the legislative intent. (See Marina Village v. California Coastal Zone Conservation Com., 61 Cal.App.3d 388, 393.) Here, the Legislature specifically designed the statute to be mandatory to avoid tax consequences arising from a voluntary assignment of income. Revenue ruling 81-209, 981-2C.B.16 strongly suggests the Internal Revenue Service (IRS) will consider interest earned on short-term and nominal client trust funds to be income to the tax-exempt foundation, not to the client so long [sic] the clients have no say as to the use of their money

to earn interest for that purpose. With any degree of client control, it is probable IRS will treat the interest as taxable "assigned income" even when the legal services actually receive the interest. For this reason Florida changed its program from a client-voluntary to an attorney-voluntary program. (See Matter of Interest on Trust Accounts (Fla. 1981) 402 So.2d 389, 390-391; see also In the Matter of the Adoption of Amendments to CPR DR 9-102 IOLTA, 102 Wa.2d 1101.

That section 6211, subdivision (a) was intended to be mandatory and to encompass all nominal/short-term deposits is confirmed by the Legislative Council's Digest to Senate Bill No. 713 (3/18/81) adding Article Fourteen to Chapter Four of Division Three of the Business and

Professions Code, stating:

> "Existing law does not require an attorney or law firm which receives or disburses trust funds to establish an interest bearing demand trust account and to deposit therein all client deposits that are nominal in amount or are on deposit for a short period of time, the earnings on which are to be paid to the State Bar to be used for programs, for free legal services to indigent persons, especially underserved client groups, as specified.
>
> "This bill would impose such a requirement, upon the adoption of a specified resolution by the Board of Governors of the State Bar."

Further, a staff commentary to a report from the Assembly Committee on Judiciary prepared for the hearing August 12, 1981, stated:

> "Although this bill would not prohibit an attorney from establishing segregated trust accounts with interest payable to the client, once unsegregated client trust accounts are created, the accounts must earn interest and the interest must be given to the State Bar to support free legal services. The source of this

bill points out the mandatory nature of this bill is necessary to avoid debilitating tax consequences which would result if clients were given the option not to participate in the program.

". . . . . .

"In order to avoid the problems faced by Florida, the Bar has structured the program proposed by this bill to eliminate clients' optional participation. The Bar argues that the attorney will still have the option of creating a separate interest account when that option is more beneficial to the client."

The Assembly Committee Report was prepared after receiving a letter from the legal services section of the State Bar of California dated August 4, 1981. The State Bar stated it had monitored the Florida program as it reacted to the IRS ruling holding if such programs are voluntary for clients all interest income generated under interest-bearing trust accounts will be taxable to the client

under the assignment of income doctrine. The State Bar expressed concern whether the IRS would approve Florida's modified approach which removed client discretion but made the attorneys participation voluntary. The letter then states:

> "Because of these developments the State Bar Board of Governors has amended SB 713 in two respects. Client preference is removed as a factor in determining whether a particular client deposit's interest income will go to SB 713 purposes. The determinative factor will be the amount and duration of the client's deposit; all client deposits of a nominal amount and/or short-term duration will be require [sic] to be deposited in interest bearing trust trust [sic] accounts with the interest thereon going to SB 713's legal services funding program. This change has been made in response to the IRS requirements noted above.
>
> The bill has also been amended to require the participation of all California attorneys. . . . "

The mandatory wording in section 6211, subdivision (a), as adopted, is

plainly consistent with the legislative history, and in contract to the earlier permissive language of Senate Bill No. 713.

SECTION 6211 IS NOT UNCONSTITUTIONALLY VAGUE

Petitioners claim the legislation is unconstitutionally vague and ambiguous because it refers to "deposits that are nominal in amount or are on deposit for a short period of time." (§ 6211, subd. (a).) However, section 6211, subdivision (c) permits the State Bar, with the approval of the Supreme Court, to formulate and enforce rules of professional conduct pertaining to the use by attorneys or law firms of interest-bearing trust accounts for unsegregated client funds. Accordingly,

the State Bar adopted rule 1.4[4] defining trust funds nominal in amount or held for a short period of time as those for which "it is not practical to segregate them to earn income for the benefit of the client in light of the income the funds could earn or the costs involved in earning or account for any such income." Further, rule 1.5 requires each State Bar member and firm of attorneys to determine whether trust funds are nominal in amount or to be held for a short period of time as defined in rule 1.4. Guidelines adopted by the State Bar of California contain the following example:

> "In determining the practical question of what is 'nominal in amount' or to be held for

---

[4]All references to rules are to rules Regulating InterestBearing Trust Fund Accounts for the Provision of Legal Services to Indigent Persons, approved by the Board of Governors of the State Bar of California on September 10, 1982.

a 'short period of time' the following informational table is provided to give some guidance. The table assumes that $50 is a reasonable estimate of a minimum amount of interest that a segregated trust account for an individual client must generate to be practical in light of the costs involved in earning or accounting for any such income.

Principle Deposit	# of Days Required to Generated $50 of Interest at 5¼ % Compounded Daily
500	654
1,000	335
2,000	169
5,000	69
10,000	34

In context, the contested language is not unconstitutionally vague or ambiguous. The guidelines are relevant because the IOLTA NOW accounts are limited by law to pay no more than 5¼ percent interest. Each lawyer and law firm is ethically required to make a good faith determination whether the

transactional costs can equal or exceed any anticipated revenue derivable from administering these trust funds in a different manner, subject to the statutory restrictions regulating such trust accounts. The above example is identical to guidelines established by the Maryland Legislature for IOLTA accounts. Maryland, however, uses $50 as the guide in determining costs, clothing that figure with a rebuttable presumption. California does not. Thus, a California lawyer or firm must determine transactional costs based upon actual costs which may vary between different lawyers and firms. The statutory language does not, as respondents suggest, require a crystal ball to determine whether it is practical to segregate client trust deposits to

earn income for a client's benefit in light of the costs involved in earning and accounting. The example they cite: whether a $500 deposit represents a client's life savings would be nominal, or whether a $5,000 deposit representing a client's weekly earnings is nominal, is inapposite. It is the amount of the deposit and the time it is anticipated to be held which is relevant, not whether it is a greater or a lesser portion of an individual client's total wealth.

CONSTRUED AS MANDATORY, THE ACT DOES NOT INVOLVE A TAKING OF PROPERTY PROHIBITED BY THE FIFTH AMENDMENT

The core factors used to determine when justice and fairness require the state compensate economic injuries caused by public action are: (1) the character of the governmental action and (2) "[t]he

economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expecta tions . . . " (Penn Central Transp. Co. v. New York City (1978) 438 U.S. 104, 124.)

Hooker v. Burr (1904) 194 U.S. 415, 419, says if a claimant is "not injured to the extent of a penny . . . , his abstract rights are unimportant." Here, the affected class of legal clients is by definition limited to those persons whose deposited funds cannot, under present banking regulations be deposited in an interest-bearing trust account so as to earn net income for the client's individual profit after offsetting transactional costs. Thus, these person suffer no real economic loss.

That the "taker" may reap a profit above and beyond the value of the property interest taken does not entitle the person from whom the property is taken to share in those profits. The owner is to receive no more than indemnity for the loss, the award cannot be enhanced by any gain to the taker. (United States v. Miller (1943) 317 U.S. 369, 375.) Here, no client is tripped of earnings potential, because the statute excludes those client deposits which individually can, because of their size and/or length of time to be held, earn income net of transactional costs.

The Fifth Amendment guarantees private property shall not "be taken for public use, without just compensation." (Agins v. Tiburon (1980) 447 U.S. 225, 260.) Here, respondents apparently

contend they are entitled to the monetary value of the interest generated by their funds deposited with their attorney. However, to do this would, under ordinary trust principles, entitled the trustee-lawyer to be reimbursed for transactional costs incurred in generating that interest and accounting for it to the client. Where, by definition, those transactional costs exceed or equal the total interest income generated, the clients suffer no loss for which they are entitled to compensation. The abstract right to control where interest earned on a person's money may be funneled is not an economic loss subject to monetary compensation.

To have a property interest subject to protection under the Fifth Amendment, one must have more than an abstract need

or desire, more than unilateral expectation. (See Board of Regents v. Roth (1972) 408 U.S. 564, 577.) Respondents mistakenly rely on the holding of Webb's Fabulous Pharmacies, Inc. v. Beckwith (1980) 449 U.S. 155, to bolster their claims of Fifth Amendment violations.

The sum deposited with the governmental entity in Webb's was $1,812,145.77, which was to benefit approximately 200 identified creditors. The money generated interest in a "pooled" account during the period while a receiver determined the amounts to which each creditor was entitled. In effect, these were interpleaded funds, subject to the general rule that interest generated during the period they are held belongs to the owner. (Id., at p. 162.)

The monies were held only to preserve them pending proof of the respective creditor entitlements. Once separate rights were determined, simple arithmetic established the interest each generated.

In Webb's, the monies were on deposit more than one year, and it appears each creditor's interest was substantial enough to generate net income if deposited separately. Webb's does not address issues pertinent to this case.

Practically speaking, should the court void section 6211, subdivision (a) on constitutional grounds, the clients would not be enhanced economically. Their deposited funds would not be returned nor would they obtain any economic advantage.

Further, when the regulation is one which promotes the common good, even by

adjusting the benefits and burdens of economic life, a compensable "taking" is less readily found than where there is a physical governmental invasion. (Webb's, at p. 164.) Where the public good is great, and a "taking" is minimal, it is permissible. Even a substantial property interest may be taken through zoning laws, etc. (Euclid v. Ambler Realty Co. (1926) 272 U.S. 365.)

We accept respondents' generalized claims that clients have property rights in their money. However, the client relinquishes control of the money once it is placed in trust with the lawyer. So long as the principal [sic] is secure, not diminished, and is not economically capable of generating net income through deposits or investments legally available for lawyers' trust funds, the client

retains no meaningful right of control except to recover the principal [sic] upon a request made before it is properly expended.

RESPONDENTS ARE NOT DENIED EQUAL PROTECTION

Respondents emphasize clients who have no trust funds on deposit with their lawyer and clients whose funds are sufficient in amount and can be held in trust for a sufficient length of time to return a net profit, need not participate in the IOLTA program and its concomitant funding of indigent legal services. This, they claim, shows those clients who are required to allow their monies to be so used, are denied equal protection of the law.

Generally, to satisfy equal protection requirements the legislative

classification need only rationally relate to a conceivable, legitimate state purpose, while cases involving "suspect classifications" touching on "fundamental interests" are strictly scrutinized. Under the stricter standard, the State must establish its compelling interest which justifies the law and that the distinctions drawn by the law are necessary to further its purpose. (Fullerton Joint Union High School Dist. v. State Board of Education, 32 Cal.3d 779, 798-799; Westbrook v. Mihaly, 2 Cal.3d 765, 784-785.)

One statute upheld under the lesser, "rationally related" test is that singling out medical malpractice judgment creditors to receive periodic payments on their judgment while other successful tort damage claimants are entitled to the

total sum upon finality of judgment. (American Bank & Trust Co. v. Community Hospital, 36 Cal.3d 359, 373.) Also, in Cory v. Shierloh, 29 Cal.3d 430, 437-438, the court, addressing disparate legislative treatment between licensed and unlicensed providers of alcohol, and between adult and minor consumers, states: "We simply ask whether the legislation adopted, for whatever purposes disclosed or undisclosed, is reasonably supportable. . . . We do not substitute our judgment for its own." The accuracy of the Legislature's belief is irrelevant because the courts will not second guess. (Also see Duke Power Co. v. Carolina Env. Study Group (1978) 438 U.S. 59, 93-94.)

For equal protection purposes, we find no fundamental interest is impinged

by mandating nominal, short-term deposits be placed in an unsegregated interest-bearing account rather than a noninterest-bearing checking account, or in an interest-bearing checking account which, because of the cost of administration and accounting would result in no net gain to the client. The parties agree there is a legitimate state interest in attempting to provide funds for indigent legal services in light of the financial crisis resulting from a substantial loss of state and local funding. They do not argue there is no rational relationship between the method employed and the goal. We find no suspect classifications here: clients who have no funds held by their lawyers subject to deposit, receive no windfall, and clients whose trust funds are

sufficient to generate net income after costs of administration and accounting pay their own way in generating their individual income. Where it is economically impossible for nominal and short-term trust deposits to generate net income, even in a pooled account, the impact, if any, on the client-depositor is so minimal, and the public interest so compelling, that the presumption of constitutionality is not rebutted.

THE ACT DENIES NO PERSON
THE RIGHT TO COUNSEL

Respondents argue that the statute discriminates between persons requiring and exercising their Sixth Amendment rights to counsel and those who do not. They claim "[f]rom this viewpoint, the statute is a restriction upon legal services: a tax imposed upon exercise of

a basis §sic] and fundamental right." This is clearly wrong. Not only is there no showing placing clients' trust funds in a section 6211, subdivision (a) account restricts access to or diminishes the representation by attorneys more than having the same trust funds placed in a non-interest-bearing trust account, there is no showing that persons who wish to use services of lawyers will hesitate to do so because of this statute. In what manner there is a discrimination between those persons needing and using lawyers and those who do not, is not shown. Nor is it a tax of any kind. It is not a charge upon the right to use legal services. Whether clients are required to deposit monies in advance to defray litigation costs, the amount of those advances and the length of time they may

remain on deposit are matters solely resolved by the contractual relationship between the lawyer and the client, usually depending on factors unique to the type of litigation and the degree of financial risk a lawyer is willing to assume in light of his relationship with the client and the client's financial responsibility.

ATTORNEY FEES

The trial court awarded respondents reasonable attorney fees and costs on finding they conferred a substantial benefit on the general public in pursuing this litigation. Our disposition changes respondents' status from that of successful to unsuccessful litigants. Unsuccessful litigants in suits to vindicate the public interest do not qualify for attorney fees under Code of Civil Proce-

dure section 1021.5 or for fees under the inherent equitable power of the courts. (See Residents Ad Hoc Stadium Com. v. Board of Trustees, 89 Cal.App.3d 274, 292-293.) Code of Civil Procedure section 1021.5 requires the lawsuit result in the enforcement of an important right benefitting the public. This litigation merely delayed implementing beneficial legislation which we uphold in its entirety.

Judgment reversed; the superior court is directed to enter judgment for the State Bar of California. Pursuant to oral stipulation of the parties, the judgment is final immediately.

CERTIFIED FOR PUBLICATION.

WORK, J.

Brown, P.J.
Wiener, J.

SUPREME COURT OF THE STATE OF CALIFORNIA

LEGAL SERVICES TRUST ACCOUNT CASES

No. 4 Civ 31635
D 001365

Petition for hearing is denied. Lucas, J., is of the opinion the petition should be granted.

DATED: May 2, 1985

_____BIRD_____
BIRD, P.J.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, July 29, 1985, I served the within PETITION FOR WRIT OF CERTIORARI in re: "David L. Chapman -vs- The State Bar of California", In the Supreme Court of the United States, No. _____.

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

CALIFORNIA RURAL LEGAL ASSISTANT
RALPH SANTIAGO ABASCAL, ESQ.
Suite 401, 2111 Mission Street
San Francisco, CA 94110

UNIVERSITY OF SAN FRANCISCO
SCHOOL OF LAW
PROFESSOR JOHN DENVIR
2130 Fulton Street
San Francisco, CA 94117

LEGAL AID SOCIETY OF ORANGE CO.
ROBERT COHEN, ESQ.
11th Floor, 2700 Main Street
Santa Ana, CA 92701

STATE BAR OF CALIFORNIA
HERBERT M. ROSENTHAL, ESQ.
LAWRENCE YEE, ESQ.
555 Franklin Street
San Francisco, CA 94102

(SERVICE CONTINUED ON ATTACHED SHEET.)

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on July 29, 1985 at Los Angeles, California.

Kathlee Kattenback

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, July 29, 1985, I served the within PETITION FOR WRIT OF CERTIORARI in re: "David L. Chapman -vs- The State Bar of California", In the Supreme Court of the United States, No. _____.

on the persons interested in said action by placing 1 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

ROBERT D. ZUMWALT, COUNTY CLERK
San Diego County Superior Court
For: Hon. F.V. Lopardo, Judge
220 West Broadway, P.O. Box 128
San Diego, CA 92112

CLERK, COURT OF APPEAL
Fourth Appellate District
Room 6010, 1350 Front Street
San Diego, CA 92101

MS. ELIZABETH CARROLL
c/o CHARLES RENSHAW, ESQ.
135 West Mission Street
Escondido, CA 92025

MR. KARL SEUTHE, ESQ.
3912 Oakwood Avenue
Los Angeles, CA 90004

ALL PARTIES REQUIRED TO BE SERVED HAVE BEEN SERVED.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on July 29, 1985
at Los Angeles, California.

Kathleen Kattebach

Supreme Court, U.S.
FILED
AUG 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term 1985

No. 85-169

DAVID L. CHAPMAN, BARBARA E. ROBERTS, DAVID V. EASTON, MICHAEL M. KALUGER, JR., DAVID C. HUNTER, MICHAEL D. FAZIO and CHRISTOPHER L. FAIRCHILD,

Petitioners

-vs-

THE STATE BAR OF CALIFORNIA, CALIFORNIA LEGISLATIVE COUNCIL OF OLDER AMERICANS,

Respondents

On Petition for A Writ Of Certiorari To The California Court of Appeal For The Fourth Appellate District, Division One

RESPONDENT THE STATE BAR OF CALIFORNIA'S BRIEF IN OPPOSITION

CHARLES S. VOGEL
ROBERT I. McMURRAY
SIDLEY & AUSTIN
2049 Century Park East
Suite 3500
Los Angeles, California 90067
(213) 556-6430

HERBERT M. ROSENTHAL
LAWRENCE C. YEE
555 Franklin Street
San Francisco, California 94102
(415) 561-8200

Attorneys for Respondents.

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether California's Funds for the Provision of Legal Services to Indigent Act, Business and Professions Code, § 6210, et seq., -- which provides that lawyers deposit nominal or short-term client trust funds that are inherently incapable of earning net interest for the client into an aggregated account, from which interest is used to provide legal services to the indigent, and which maintains the obligation of attorneys to deposit client funds, which are not nominal in amount or are not deposited for a short term, into interest-bearing accounts for the benefit of clients -- involves taking of property without just compensation, prohibited by the United States Constitution?

2. Whether there is a reasonable basis in classification and use of client

QUESTIONS PRESENTED
(Cont'd)

funds, which inherently cannot earn interest to benefit the client, for providing funds for legal services to the poor?

3. Whether the statute should be strictly scrutinized because of petitioners' contention that it will cause clients to hesitate to seek services of attorneys?

SUBJECT INDEX

	PAGE
STATEMENT OF THE CASE	2-6
REASONS WHY THE WRIT SHOULD BE DENIED	6-29
A. The Opinion Below Was Decided In A Way Consistent With The Applicable Decisions Of This Court And Present No Important Questions Of Federal Law Which Have Not Been Settled By This Court	7-28
1. The Taking of Property Issue	7-25
(a) No Economic Impact Nor Reasonable Investment-Backed Expectation	8-13
(b) Character of IOLTA: Economic Regulation For Public Good	13-18
(c) Petitioners Misapply the Webb's Case	18-25
2. Equal Protection	26-28
(a) Rational Basis	26
(b) No Strict Scrutiny: No Denial Of Right To Counsel	27-28

SUBJECT INDEX
(Cont'd)

		PAGE
B.	The Opinion Below Is Not In Conflict With The Decisions Of Another State Court Or Of A Federal Court Of Appeals	29
CONCLUSION		30

TABLE OF AUTHORITIES

PAGE

Cases

Adoption of Amendments to CPR DR-102 IOLTA, Matter of, Slip Opinion, pp. 6, 8, 9 (Supreme Court of Washington, June 19, 1984) 22

Andrus v. Allard, 444 U.S. 51, 65 (1979) 14,16

Carroll v. State Bar, 166 Cal.App.3d 1193 (1985) 1

Cohan v. Alvord, 162 Cal.App.3d 176 (1984) 26

Dandridge v. Williams, 397 U.S. 485 (1970) 26

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 14

First National Bank and Trust Co. of Evanston v. Rosewell, 93 Ill.3d 388 (1982) 444 N.E.2d 126, Cert. Denied, 464 U.S. 803 (1983) 25

Hadacheck v. Sebastian, 239 U.S. 394 (1915) 14

Helvering v. Horst, 311 U.S. 112 (1940) 9

Hass, William C., and Co. v. City and County of San Francisco, 605 F.2d 117, 1120 (9th Cir. 1979) 14

TABLE OF AUTHORITIES
(Cont'd)

PAGE

Cases (Cont'd)

Interest on Trust Accounts, Matter of, 402 So.2d 389, 395, 396 — 21,25

Loretto v. Teleprompter 102 S.Ct. 3164, 3179 (1982) — 13

Lucas v. Earl, 281 U.S. 111 (1930); Revised Ruling 81-209, 981-2 C.B.16 — 9

Minnesota Bar, Petition of, 332 N.W.2d 252, 157 (Minn. 1982) — 25

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1983) — 12

New Hampshire Bar, Petition of, 453 A.2d 1258, 1261 (N.H. 1982) — 25

Ortwein v. Schwab, 410 U.S. 656 (1973) — 28

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978) — 7,13,16

Pruneyard Shopping Center v. Robins, 447 U.S. 74, 3 (1980) — 7

Ruckelhaus v. Monsanto Co., ___ U.S. ___, 81 L.Ed.2d 815, 104 S.Ct. 2862, 2875 (1984) — 7

TABLE OF AUTHORITIES
(Cont'd)

PAGE

Cases (Cont'd)

Texaco v. Short, 454 U.S. 516, 530 (1982) 11

United States v. Kraus, 409 U.S. 436 (1973) 28

United States v. Twin City Power Co., 350 U.S. 222, 228 (1956) 12

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 18,19 21-25

Statutes

California Business and Professions Code

Section 6210 2,22
Section 6211(a) 3,4,21
Section 6211(b) 3-5,21

Miscellaneous

ABA Committee on Ethics and Professional Responsibility Formal Opinion No. 348, 68 ABA 1502 8

No. 85-169

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID L. CHAPMAN, ET AL.

Petitioners,

- vs -

THE STATE BAR OF CALIFORNIA, ET AL.,

Respondents.

RESPONDENT THE STATE BAR OF CALIFORNIA'S BRIEF IN OPPOSITION

Respondent, The State Bar of California (hereinafter "State Bar"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion in this case of the California Court of Appeal, Fourth Appellate District, following the order of the California Supreme Court summarily denying a petition for hearing. That opinion is reported as Carroll v. State Bar, 166 Cal.App.3d 1193 (1985). (A copy of the opinion is included in petitioner's appendix (hereinafter

"P.A.") to the petition for writ of certiorari. P.A. at 15-50.

STATEMENT OF THE CASE

Petitioners challenge California's Funds For The Provision Of Legal Services To The Indigent Act, Bus. & Prof. Code, § 6210, et seq.,[1] which establishes a program requiring attorneys to deposit nominal and/or short term client trust funds in an aggregated account from which the interest is paid to the State Bar for funding legal services to the indigent by approved non-profit groups. Such programs are generally referred to by the acronym "IOLTA" (Interest on Lawyer Trust Account Program).[2]

California's IOLTA, like other similar programs, specifies that are "nominal" or

---

[1]Unless otherwise noted, all references to sections are to California Business and Professions Code.

[2]Thirty-seven states have adopted IOLTAs. California is the largest, having received $19.8 million and allocated $17.2 million as of July 31, 1985.

"short-term" funds are those which are so minimal in amount or are held for such a short time, they inherently cannot generate net interest for the client because any interest earned is dissipated by costs charged by banks and attorneys for administration and accounting . § 6211(a); P.A. at 20-22. California's IOLTA maintains the right and obligation of attorneys to deposit client trust funds, which are capable of earning net interest, into segregated interest-bearing accounts for the benefit of the client. § 6211(b); P.A. at 23. Finally under IOLTA, client trust funds on deposit remain available, on demand, and the client's rights to withdraw, obligate or convey them are unaffected.

This matter below was originally a coordinated proceeding involving two cases, Carroll v. State Bar (Superior Court of San Diego County, No. N22139) and Seuthe, et al. v. State Bar (Superior Court of Los

Angeles County, No. C455587). Plaintiff in Carroll was a client and the legal secretary for the attorney representing her; all plaintiffs in Seuthe, et al., are attorneys. Seuthe, et al. was brought as a class action, but the class was never certified, and petitioners appear only in their individual capacities.

The opinion below reverses a trial court judgment misconstruing IOLTA as client-voluntary in that § 6211(b) permits attorneys to deposit nominal and short-term trust funds into interest-bearing accounts, for charitable purposes other than those authorized by IOLTA. The court of appeal held that § 6211(a), is plain, clear, and unambiguous, requiring mandatory deposits

---

[3]The court also found that the legislative history showed a mandatory program was adopted to eliminate the tax consequences and problems of "assigned income" that a client-voluntary IOLTA would create. The legislature was aware that under Revenue (Continued)

of nominal and short-term client trust funds into IOLTA accounts,[3] and that § 6211(b) permits investing of those client funds not nominal or short term and thus capable of earning net interest. P.A. at 22, 23. The court then ruled the statute is not unconstitutionally vague and ambiguous,[4] and does not involve the uncompensated taking of property prohibited by U.S. Constitution, Fifth Amendment. It rejected petitioners' equal protection claim, holding that instead there is a rational relationship between the method employed and goal of IOLTA, and finding no merit to the contention that the statute infringed on

---

[3](Continued) Ruling 81-209, 1981-12 C.B.16 a client-voluntary IOLTA would engender debilitating costs of accounting for tax purposes. P.A. at 27-32.

[4]Petitioners do not seek review of this issue.

the right to counsel and thus should be subject to strict scrutiny.

After the decision of the court of appeal, only the attorney-plaintiffs in Seuthe, et al., filed a petition for hearing in the California Supreme Court; the sole client-plaintiff, Mrs. Carroll, did not seek further review. The petition for hearing was denied without opinion. The attorney-plaintiffs in this case, rev'd sub nom. Chapman, et al., v. State Bar, now petition for a writ of certiorari in this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

The opinion below presents no important federal questions involving taking of clients' property without just compensation, any unreasonable classification, or impairment of any fundamental right. In addition, the opinion below is not in conflict with any decisions of other jurisdictions.

A. The Opinion Below Was Decided In A Way Consistent With The Applicable Decisions Of This Court And Presents No Important Questions Of Federal Law Which Have Not Been Settled By This Court

1. The Taking Of Property Issue. The court below correctly held that IOLTA involves no taking of property without just compensation, prohibited by the Fifth Amendment. In determining whether there is such a constitutional violation, this Court has utilized a multifactor balancing test which considers: (1) economic impact, (2) any interference with reasonable investment back expectations, and (3) the character of the governmental actions. Ruckelhaus v. Monsanto Co., ___ U.S. ___, 81 L.Ed.2d 815, 104 S.Ct. 2862, 2875 (1984); Pruneyard Shopping Center v. Robins 447 U.S. 74, 83 (1980); Penn Central Transportation Co. v. New York City 438 U.S. 104, 124 (1978). These factors were judiciously applied in the opinion below. P.A. at 36-42.

(a) No Economic Impact Nor Reasonable Investment-Backed Expectation. The court of appeal correctly found that IOLTA has no economic impact on clients. Id. Deposits into IOLTA accounts are limited only to those client funds which under current banking regulations are inherently incapable of earning net interest for the client in other interest-bearing accounts. Before the enactment of IOLTA, attorneys would deposit such funds into a single, aggregate non-interest account to carry out their ethical obligation of securing client funds. ABA Comm. on Ethics and Prof. Resp. Formal Op. No. 348, 68 ABA 1502. These nominal and short-term funds were not deposited in interest accounts because service fees charged by banks or handling costs by attorneys would exceed any interest earned. P.A. at 39. IOLTA is able to generate net income only by avoiding these transactional costs through

the payment of the interest to a single beneficiary designated by statute.

Petitioners suggest without explanation that some profit can be obtained by clients from the aggregated IOLTA accounts. They suggest value may be realized if a client were allowed to control the disposition of interest earned on the nominal or short-term funds by designating the recipient of the interest as himself or some charity. This is the same client-voluntary argument rejected below. No net interest is possible if a client participates. With any degree of client control, the interest will be treated as taxable "assigned income." P.A. at 27-28; see Helvering v. Horst, 311 U.S. 112 (1940); Lucas v. Earl, 281 U.S. 111 (1930); Rev. Ruling 81-209, 1981-12 C.B.16. To determine the amount remittable to each client and to meet reporting and other tax consequences, each client's share of the interest must be calculated and accounted

for, thereby engendering the debilitating administrative costs IOLTA is designed to eliminate.

In sum, funds which before IOLTA could not earn interest for the client are still incapable of earning interest; and funds which before could earn interest must still be invested on behalf of the client. The client's economic stake is unaffected by IOLTA[5] The court below correctly concluded no client is stripped of earnings and no person has suffered any economic

---

[5]The only significant change made by IOLTA is that financial institutions, which previously enjoyed the "free" use of the nominal and short-term funds held in client trust accounts, must now pay interest to the State Bar for distribution for the legal services to the poor.

loss. P.A. at 38. Accordingly, IOLTA has not, and by definition cannot, interfere with any client's "distinct investment-backed expectations." Id. at 39, 40. Any claim on the monetary value of such interest is no more than a unilateral expectation. As the court below concluded:

> "To have a property interest subject to protection under the Fifth Amendment, one must have more than an abstract need or desire, more than unilateral expectations." Id., citing Board of Regents v. Roth 408 U.S. 564, 577 (1972); see also Perry v. Sindermann 408 U.S. 593, 601 (1972).

The failure of petitioners' taking argument is apparent in their inability to state what appropriate compensation is due. After all, it is only the state's failure to provide for just compensation which renders some action invalid as violative of the Fifth Amendment's mandate. See Texaco v. Short 454 U.S. 516, 530 (1982).

Petitioners misunderstand this principle of just compensation when they

claim that the rights they assert should not be tied to a dollars and cents analysis. Petition, p. 20.

Just compensation must be measured by loss to the owner. See United States v. Twin City Power Co., 350 U.S. 222, 228 (1956) ("since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker"); Monongahela Navigation Co. v. United States, 148 U.S. 312 (1983) (standard is to provide "a full and just equivalent"). By definition, funds deposited in IOLTA accounts are those with no interest-earning potential to the client. Since no interest potential has been lost, and the trust account corpus is not touched, the detriment to the owner--what the client has lost--is zero. Holders of nominal or short-term accounts are already in as good a position pecuniarily as they would be absent the alleged taking. IOLTA has deprived them of

nothing, and there is nothing to restore to them. By definition there could not have been a deprivation of a valuable property interest in violation of the Fifth Amendment.

(b) Character of IOLTA: Economic Regulation For Public Good. The court below correctly concluded that IOLTA promotes the common good without diminishing a client's economic interest. P.A. at 41, 42. It properly applied the standards promulgated by this Court: when no physical invasion of property is involved, a "taking" will be tested by examining the adjustments of economic burdens and benefits, on the one hand, against the public purpose served, on the other. Penn Central Transportation Co. v. New York City 438 U.S. at 142, 125; Loretto v. Teleprompter, 458 U.S. 419, 426 (1982). "Where the public good is great, and a 'taking' is minimal, [the action] is permissible." P.A. at 42.

Thus, this Court has generally upheld substantial restrictions on private property use when significant public policy goals are involved. In Andrus v. Allard, 444 U.S. 51, 65 (1979), this Court upheld a prohibition on the sale or possession of migratory birds and their parts even though "this adjustment curtails some potential for the use or economic exploitation of property." In Euclid v. Ambler Realty Co. 272 U.S. 365 (1926), this court held that the need to control commercial development justified a restriction which diminished the potential value of private land by 75%. In Hadacheck v. Sebastion, 239 U.S. 394 (1915), elimination of a brickyard operation in a residential area was upheld although property value diminished 87%. In William C. Hass & Co. v. City and County of San Francisco, 605 F.2d 1117, 1120 (9th. Cir. 1979), the court held open space development

considerations justified restriction which diminished property value by 95%.

The nature of the effect on private rights under IOLTA contrasts sharply with the private rights effected in these cases. As stated above, a client's economic interest is unchanged by IOLTA. In short, a significant and urgent public need is met without any significant consequences or restrictions on private property. As this Court concluded in an analogous context,

> The State surely has the power to condition the ownership of private property on compliance with conditions that impose such a slight burden on the owner while providing such clear benefits to the State. Texaco v. Short, 454 U.S. at 530.

Throughout the proceedings petitioners have not disputed the legitimacy of IOLTA to provide civil legal services to the poor. Petition, p. 12. Their objection is that IOLTA allegedly removes all beneficial uses of nominal and short-term client funds. Petition, p. 20.

As stated above, IOLTA accounts apply only to client trust funds which cannot benefit clients. This principle aside, petitioners' argument is still flawed because of its too-narrow focus on use of nominal and short term funds. The government regulatory impact must be judged against the property's value as a whole, not against its impact on any part or particular use. Andrus v. Allard, 444 U.S. 51, 65-66.

For example, in Penn Central, supra, plaintiffs argued that the airspace above an existing building was a valuable property right, that the city's refusal to let them build an additional structure totally deprived them of all gainful use of that space, and that therefore their right to the airspace had been "taken" regardless of the significance of any public interest involved.

This Court held that the restriction's impact must be judged against

the whole parcel's value, including that of the existing building, not just that of the air rights segment:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole - here, the city tax block designated as the "landmark site." Penn Central, supra, 438 U.S. at 130 (emp. added).

Since the site and the existing building retained some economic value despite the limitation on additional development, the Court found no taking.

Similarly, IOLTA's impact on a client's trust fund must be assessed against his whole property interest. IOLTA leaves unaffected the rights of clients to have invested trust funds, which are not nominal or short term. As for nominal and short-

term funds, the principal remains available on demand, and the client's rights to withdraw, obligate or convey it are unaffected by IOLTA. Even if some theoretical right to exclusive control of property is effected, the impact of a client's total rights would not be substantial enough to warrant the finding of a "taking." This Court has stated:

> [T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. Andrus v. Allard, 444 U.S. at 65-66 (emp. added).

(c) Petitioners Misapply the Webb's Case. Throughout the proceedings, petitioners have relied principally on one decision of this Court, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).

Although Webb's is facially similar to the case at bar in that both concern interest earned on deposited funds, the court below properly noted that Webb's failed to address the issues pertinent to this case. P.A. at 41. In Webb's, the purchaser of Webb's Fabulous Pharmacies interpleaded the purchase price and named as defendants both Webb's and its creditors. The buyer deposited over $1,800,000, with the court. One Florida statute exacted a fee for the clerk's services, amounting in this case to $9,228.74. The $1.8 million remained on deposit until it was delivered to Webb's' receiver over a year later. By then the interpleader fund had earned over $90,000 in interest. Under a second Florida statute, this interest was deemed income of the county. This Court held that there was no justification shown for the state's retention of the interest. Webb's, at 163. It specifically rejected the state's

argument that the withholding was justified as a cost reasonably related to the use of the courts, which was already satisfied by the substantial fee prescribed by the first statute. This Court noted that Florida's statute would allow the state to exact two tolls on the interpleader fund. Id., at 160. The Court carefully emphasized its holding was restricted to this type of "double-charge" situation:

> We hold that under the narrow circumstances of this case - where there is a separate and distinct state statute authorizing a clerk's fee for services rendered based upon the amount of principal deposit; where the deposited fund intself concededly is private; and where the deposit in the court's registry is required by state statute in order for the deposit to avail itself of the statutory protection from claim of creditors and others - Seminole County's taking unto itself ... the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments. We express no view as to the constitutionality of a statute that prescribes the county's retention of interest earned, where the interest would be the only return to the county for the services it renders. 449 U.S. at 165.

In IOLTA, no such inequitable double charge exists.

In addition, Webb's is factually dissimilar on other grounds. Most significantly, the disputed interest on the fund in Webb's was clearly a property interest. The amount involved ($1,800,000), the interest earned (over $90,000), and the time of deposit (over a year), indicate that the fund in Webb's was neither nominal nor short term, and that the interest due each creditor could have been easily calculated. See P.A. at 410. By contrast, § 6211(a) applies only to normal or short term funds, on which clients cannot earn interest. Moreover, § 6211(b) expressly provides for deposit of client funds into interest bearing accounts for the client's benefit where the sum deposited or the time which it will be held is substantial (like the Webb's situation). See also, Matter of Interest on Trust Accounts 402 So.2d 389,

395, 396 and Matter of the Adoption of Amendments to CPR DR-102 IOLTA, slip op. pp. 6, 8, 9 (Supreme Court of Washington, June 19, 1984). Moreover, this Court also noted in Webb's that the statute could have been justified if it promoted the general welfare, but that the Florida statute suggested no reasonable basis for the taking of the interest of the interpleader fund. Webb's, supra, at 163. By contrast, the California Legislature has expressly found that IOLTA "will aid in the advancement of the science of jurisprudence and the improvement of the administration of justice." § 6210. Moreover, petitioners concede that the purposes of IOLTA are important to the common good. Petition, p. 12. The court below, after carefully balancing the benefits and burdens, found IOLTA to further public policy without diminishing client's rights. P.A. at 41-42.

Petitioners have relied on language in Webb's holding that "the State's having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest," and rejecting Florida's argument that "the statute takes only what it creates." 449 U.S. at 162, 163. Out of context, this dictum appears to bolster petitioners' allegation of a taking by IOLTA. However, this language is inapplicable to the differing factual circumstances of IOLTA.

As stated above, the fund in Webb's was always capable of earning interest. However, when deposited in interpleader, state law originally did not obligate the court clerk to invest the fund in an interest-bearing account. Therefore, the Florida statute which commanded that such funds be placed in an interest-bearing account, merely restored the fund's interest-earning potential which was lost

under the interpleader statute. The fact that this state statute restored the potential did not alter the continued private nature of the property right in such interest.

The critical distinction is that in IOLTA, the funds subject to the statute are inherently not capable of earning interest in private hands. The client, no matter what he does with his individual fund, can never earn net interest on his nominal or short-term trust account. This intrinsic character, not some state statute, deprives the funds of any interest-bearing potential. IOLTA, by aggregating such funds and mandating payment of interest without subaccounting, truly has "created" something where nothing existed before. No private property right or expectation ever existed in such interest. In Webb's on the other hand, the state statute did not "create" interest potential where none inherently existed, it

simply removed the artificial barrier to that potential put up by another state restriction. See Matter of Interest on Trust Accounts, 402 So.2d at 395; Petition of Minn. Bar, 332 N.W.2d 252, 157 (Minn. 1982); Petition of New Hampshire Bar, 453 A.2d 1258, 1261 (N.H. 1982).[6]

---

[6]In First Nat'l. Bank & Trust Co. of Evanston v. Rosewell, 93 Ill.3d 388 (1982), 444 N.E.2d 126, cert. denied, 464 U.S. 803 (1983), the Illinois Supreme Court considered a taxpayer's contention that failure to pay interest on taxes paid under protest and later refunded constituted a taking in violation of the Fifth Amendment. The taxpayer, citing Webb's, argued that if he were compelled to deposit the funds with the state he was entitled to the interest generated by such moneys, not the state. The amount involved exceeded $1 million so that interest was of significance.

The court concluded that Webb's did not establish any per se rule concerning property rights to interest on deposited money. Rather the focus on Webb's was on the inequity of withholding interest and assessing a service charge as well, and the Webb's Court expressed no view as to constitutionality of interest retention absent such double billing. The Illinois court reasoned that since the Illinois statute had no such service fee, "we view the retention of accrued interest as not constitutionally prohibited." 93 Ill.2d at 395.

2. Equal Protection

(a) Rational Basis. Petitioners contend that IOLTA unlawfully discriminates between clients who have nominal and short-term funds on deposit with attorneys and those who do not. If a classification has some reasonable basis, it does not offend the Constitution simply because some inequality may result; statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. Dandridge v. Williams, 397 U.S. 485 (1970). In this case, the court below correctly applied this standard in finding there is a rational basis for the use of funds, which cannot result in any net gain or loss to the client to provide funds, for legal services to the poor. P.A. at 46.[7]

---

[7]See also Cohan v. Alvord 162 Cal.App.3d 176 (1984), where plaintiffs alleged that a statute that provides for the payment of interest on refunded property taxes only (Continued)

(b) No Strict Scrutiny: No Denial Of Right To Counsel. Petitioners contend that IOLTA impinges on the right to counsel, which they state, without the benefit of any authority, is a fundamental right, and thus is subject to the strict scrutiny test. The court below correctly rejected this unsupported argument that clients who seek the services of lawyers would now hesitate to do so because of IOLTA. P.A., at 47-49.[8] .

---

[7](Continued) when the interest is $10 or more violated equal protection. The court held "... the de minimis $10 classification scheme ... is reasonably related to the legitimate state interest of easing administrative burdens and is not violative of the right to equal protection under either federal or state law...."

[8]The record below, Appellant's Appendix In Lieu of Clerk's Transcript, at 901-905, showed, for example, that among the IOLTA accounts of the attorney-petitioners in this case, only one account was generating net interest for the period May-August 1983. That account of petitioner David V. Easton aggregated net interest of 37 cents. An argument that (Continued)

This court has rejected similar constitutional challenges that court costs and fees (which will usually constitute nominal and short-term client trust funds under IOLTA if advanced to the attorney) deny access to the courts. See, e.g., United States v. Kras, 409 U.S. 436 (1973); Ortwein v. Schwab, 410 U.S. 656 (1973). This Court has reasoned that payment of fees and costs may subject some litigants to inconvenience, but such inconvenience does not rise to a "'fundamental interest that is gained or lost'" because of the effect of the imposition of a fee. Accordingly, such matters have been analyzed and sustained by the rational basis test. Id., 660.

---

[8](Continued) clients would forego the services of Mr. Easton because they could not claim their respective share of the 37 cents is not credible.

B. The Opinion Below Is Not In Conflict With The Decisions Of Another State Court Or Of A Federal Court Of Appeals.

Petitioners assert jurisdiction of this Court under Rule 17.1(b), suggesting that the opinion of the court below is in conflict with other state courts that have reviewed or adopted IOLTA or with a decision of a federal court of appeals. Petitioners make this assertion without any citations or analysis. The Brief of Amici Curiae In Opposition To Granting Of A Writ Of Certiorari, pp. 5-7, correctly sets forth the status of the opinions of the courts in other jurisdictions, and we adopt their position herein. As demonstrated by amici curiae, the opinion below is not in conflict with other state courts or with any decision of a federal court of appeals. Any suggestion of conflict by petitioners is misleading and should be rejected.

CONCLUSION

For all of the foregoing reasons, the petiton for writ of certiorari should be denied.

Respectfully submitted,

Herbert M. Rosenthal
Lawrence C. Yee

SIDLEY & AUSTIN
Charles S. Vogel
Margaret R. Dollbaum
Robert I. McMurray

By: Herbert M. Rosenthal
Herbert M. Rosenthal
Attorney of Record

Attorneys for Respondent
The State Bar of California

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the Supreme Court of the United States, certifies that three copies of the RESPONDENT STATE BAR OF CALIFORNIA'S BRIEF IN OPPOSITION have been served on counsels of record for the parties herein by mailing same, first-class postage prepaid, this the 30th day of August 1985, as follows:

Barbara E. Roberts, Esq.
David L. Chapman, Esq.
673 West Naomi Avenue
Arcadia, CA 91006

Ralph Santiago Abascal, Esq.
California Rural Legal Assistance
2111 Mission Street, Suite 401
San Francisco, CA 94110

Peter M. Siegel, Esq.
Florida Justice Institute
1400 AmeriFirst Building
One Southeast Third Avenue
Miami, FL 33131

ALL PARTIES REQUIRED TO BE SERVED HAVE BEEN SERVED.

CERTIFICATE OF SERVICE
(Cont'd)

In addition to the above persons, the following have also been served in the same manner as above:

Charles C. Renshaw, Esq.
135 West Mission Avenue, Suite 111
Escondido, CA 92025

Gregory Knoll, Esq.
Legal Aid Society of San Diego
110 South Euclid Avenue
San Diego, CA 92114

Peter H. Reid, Esq.
Legal Aid Society of
San Mateo County
2221 Broadway
Redwood City, CA 94063

Robert Cohen, Esq.
Legal Aid Society of
Orange County
2700 North Main Street
Santa Ana, CA 92701

Robert D. Raven, Esq.
Morrison & Forester
Spear Street Tower
One Market Plaza
San Francisco, CA 94105

Clerk, California Supreme Court
350 McAllister Street
Room 3154
San Francisco, CA 94102

CERTIFICATE OF SERVICE
(Cont'd)

Clerk, Court of Appeal
Fourth Appellate District
Room 6010, 1350 Front Street
San Diego, CA 92101

Robert D. Zumwalt, Clerk
Superior Court of San Diego County
County Courthouse
220 West Broadway
San Diego, CA 92101
(For: Hon. F. V. Lopardo)

Judicial Council
350 McAllister, Room 3154
San Francisco, CA 94102

Herbert M. Rosenthal

Herbert M. Rosenthal

Supreme Court, U.S.
FILED
AUG 29 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 85-169

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

DAVID L. CHAPMAN, et al,

Petitioners,

vs.

THE STATE BAR OF CALIFORNIA, et al,

Respondents.

BRIEF OF AMICI CURIAE IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

---

* PETER M. SIEGEL
ARTHUR J. ENGLAND, JR.
RANDALL C. BERG, JR.

FLORIDA JUSTICE INSTITUTE
1400 AmeriFirst Building
One Southeast Third Ave.
Miami, Florida 33131
(305) 358-2081

ATTORNEYS FOR AMICI CURIAE

* Counsel of Record, Member of the Bar of the Court

EST AVAILABLE COPY

TABLE OF CONTENTS

Table of Authorities ii

Amici Curiae iv

Interest of Amici Curiae 1

Reasons for Denying the Writ 5

Argument: IOLTA Programs, Which Do Not Injure Clients Even To The Extent Of A Penny, Are Fully Consistent With Current Supreme Court Takings Jurisprudence 5

A. IOLTA's Nationwide Acceptance 5

B. The IOLTA Premise 9

1. Cost Deposits 11
2. Real Estate Escrows 12
3. Personal Injury Settlements 13
4. Real Estate Closings 14

C. Lack of a Substantial Constitutional Question 15

Conclusion ... .16

Certificate of Service

TABLE OF AUTHORITIES

CASES	PAGE(S)
Andrus v. Allard, 444 U.S. 51 (1979)	8
Glaeser v. The Florida Bar, No. 84-1345 (M.D. Fla. filed Oct. 11, 1984)	7, 11
Hooker v. Burr, 194 U.S. 415 (1904)	9
In the Matter of the Adoption of Amendments to CPR DR 9-102 IOLTA, 102 Wash.2d 1101 (1984)	5
In the Matter of Interest on Lawyers' Trust Accounts, 283 Ark. 252, 675 S.W.2d 355 (1984), rev'g, 279 Ark. 84, 648 S.W.2d 480 (1983)	6
Matter of Interest on Lawyers' Trust Acc., 672 P.2d 406 (Utah 1983)	5
Matter of Interest on Trust Accounts, 402 So.2d 389 (Fla. 1981)	5
Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)	8
Petition by Massachusetts Bar Ass'n, 478 N.E.2d 715 (Mass. 1985)	6
Petition of Minnesota State Bar Association, 332 N.W.2d 151 (Minn. 1982)	5
Petition of New Hampshire Bar Association, 122 N.H. 971, 453 A.2d 1258 (1982)	5

Ronwin v. Supreme Court of Iowa, (No. 84-1641) pet. for cert. denied, ___ U.S. ___ (May 14, 1985) 7

Terry v. Withrow, No. C85-1767 (N.D. Ohio filed June 21, 1985) 7

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 15

OTHER AUTHORITIES

A.B.A. Formal Opinion 348, 68 ABA J. 1502 (1982) 6

A.B.A. Task Force and Advisory Board on Interest on Lawyer Trust Accounts, Report to the Board of Governors (July 1982) 10

England & Carlisle, History of Interest on Trust Accounts Program, 56 Fla. B.J. 101 (1982) 2

IOLTA UPDATE, National IOLTA Clearinghouse, Vol. 3, No. 1 (Summer 1985) 6, 7

Siegel, Interest on Lawyers' Trust Account Programs: Do They "Take" "Property" of the Client? 36 U. Fla. L. Rev. 674 (1984) 2

AMICI CURIAE

1. American Judicature Society
2. Arizona Bar Foundation
3. State Bar of Arizona
4. Arkansas Bar Association
5. Colorado Bar Association
6. Colorado Lawyer Trust Account Foundation
7. Delaware State Bar Association
8. District of Columbia Bar Foundation
9. The Florida Bar
10. Florida Bar Foundation
11. Hawaii State Bar Association
12. Hawaii Bar Foundation
13. Idaho State Bar
14. Idaho Law Foundation
15. Lawyers Trust Fund of Illinois
16. Lawyer Trust Account Commission of the Supreme Court of Iowa
17. Kansas Bar Foundation
18. Maryland Legal Services Corporation
19. Massachusetts Bar Foundation

20. Boston Bar Foundation

21. Minnesota State Bar Association

22. Minnesota Lawyer Trust Account Board

23. Mississippi State Bar

24. Mississippi Bar Foundation

25. Missouri Lawyer Trust Account Foundation

26. National Bar Association

27. National IOLTA Clearinghouse

28. National Legal Aid & Defender Association

29. Nebraska Lawyers Trust Account Foundation

30. State Bar of Nevada

31. New Hampshire Bar Foundation

32. State Bar of New Mexico

33. New Mexico Bar Foundation

34. New York State Bar Association

35. Interest on Lawyer Account Fund of the State of New York

36. North Carolina State Bar

37. North Carolina State Bar Plan For Interest on Lawyers' Trust Accounts

38. Office of the Ohio Public Defender

39. Oklahoma Bar Association

40. Oklahoma Interest on Lawyers' Trust Account Program

41. Oregon State Bar

42. Oregon Law Foundation

43. Rhode Island Bar Association

44. Rhode Island Bar Foundation

45. State Bar of South Dakota

46. Tennessee Bar Association

47. Tennessee Bar Foundation

48. State Bar of Texas

49. Texas Equal Access to Justice Foundation

50. Utah State Bar

51. Utah Bar Foundation

52. Vermont Bar Association

53. Washington State Bar Association

54. Legal Foundation of Washington

55. The West Virginia State Bar

NO. 85-169

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

DAVID L. CHAPMAN, et al,

Petitioners,

vs.

THE STATE BAR OF CALIFORNIA, et al,

Respondents.

BRIEF OF AMICI CURIAE IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

The California interest on lawyers' trust accounts program, like the 36 similar programs throughout the country (herein collectively referred to as "Interest on Lawyers' Trust Account Programs," or "IOLTA" programs) operates on

the premise that nominal sums of money, or short term deposits, held by attorneys on behalf of their clients, constitute an unused economic resource which may be mobilized to generate income to improve the delivery of legal services to the poor. In short, IOLTA establishes a unique method of financing civil legal aid by harnessing assets that before adoption of the program, were neither used nor capable of use.[1]

The fifty-five Amici Curiae are all organizations vitally interested in the continued growth and success of IOLTA programs as a mechanism for bringing the

---

1. IOLTA's history and method of operation is explained in England & Carlisle, History of Interest on Trust Accounts Program, 56 Fla. B.J. 101 (1982). For a detailed explanation, and in depth analysis of the constitutional issues implicated by IOLTA, see Siegel, Interest on Lawyers' Trust Account Programs: Do They "Take" "Property" of the Client? 36 U. Fla. L. Rev. 674 (1984).

concept of equal justice under the law a step closer to reality. The twenty-three participating state bar associations have all been instrumental in creating IOLTA programs in their respective states. The twenty-eight participating IOLTA administering agencies all collect IOLTA generated funds and distribute them to providers of legal services to the poor, and for other worthy law-related public purposes.

The American Judicature Society, the National Bar Association and the National Legal Aid & Defender Association appear as amici because they represent a membership committed to improving the justice system so that all may have an equal opportunity to vindicate their rights. The National IOLTA (Interest on Lawyers' Trust Accounts) Clearinghouse provides technical assistance to states seeking to

adopt and implement IOLTA programs.

Each participating Amicus Curiae believes that IOLTA is critically important to ensuring that those in need of legal services do not go without. Their participation, and the participation of the Ford Foundation in providing funds to assist in the preparation of this Amici Curiae brief, all attest to the acceptance of the IOLTA concept by providers of legal services to the poor and a broadly representative sample of the legal profession throughout the country. Firmly believing that IOLTA programs are in the best tradition of the legal profession and not violative of the fifth amendment, Amici Curiae fully support the State Bar of California's and the Intervenors' position that the California IOLTA program does not violate the Taking Clause of the fifth amendment to the United States Constitution.

REASONS FOR DENYING THE WRIT

ARGUMENT

IOLTA PROGRAMS, WHICH DO NOT INJURE CLIENTS EVEN TO THE EXTENT OF A PENNY, ARE FULLY CONSISTENT WITH CURRENT SUPREME COURT TAKINGS JURISPRUDENCE.

A. IOLTA's Nationwide Acceptance.

Thirty-six states and the District of Columbia have adopted IOLTA programs. The highest courts of seven states have published formal opinions adopting IOLTA programs; expressly holding that IOLTA does not violate the fifth amendment. Matter of Interest on Trust Accounts, 402 So.2d 389 (Fla. 1981); Petition of Minnesota State Bar Association, 332 N.W.2d 151 (Minn. 1982); Petition of New Hampshire Bar Association, 122 N.H. 971, 453 A.2d 1258 (1982); Matter of Interest on Lawyers' Trust Acc., 672 P.2d 406 (Utah 1983); In the Matter of the Adoption of

Amendments to CPR DR 9-102 IOLTA, 102 Wash.2d 1101 (1984); In the Matter of Interest on Lawyers' Trust Accounts, 283 Ark. 252, 675 S.W.2d 355 (1984), rev'g, 279 Ark. 84, 648 S.W.2d 480 (1983); Petition by Massachusetts Bar Ass'n, 478 N.E.2d 715 (Mass. 1985).

In addition, twenty-five state supreme courts have adopted IOLTA programs without formal opinion. Besides California, IOLTA programs have been established by legislation in Connecticut, Maryland, New York and Ohio. IOLTA UPDATE, National IOLTA Clearinghouse, Vol. 3, No. 1 (Summer 1985). The American Bar Association has endorsed the ethical propriety of IOLTA programs. A.B.A. Formal Opinion 348, 68 ABA J. 1502 (1982).

No court, in an adversary proceeding, has ever rejected an IOLTA pro-

gram.[2] Four state supreme courts, without opinion, have refused to approve IOLTA programs. Petitions seeking the adoption of IOLTA programs are currently pending before six state supreme courts. IOLTA UPDATE, National IOLTA Clearinghouse, Vol. 3, No. 1 (Summer 1985).

Two basic reasons account for the overwhelming acceptance of IOLTA. First, the legal profession fully recognizes the critical need for additional resources to

---

2. Besides the instant matter, the only pending adversary litigation is Glaeser v. The Florida Bar, No. 84-1345 (M.D. Fla. filed Oct. 11, 1984). Two other challenges to IOLTA programs have been rejected. In Ronwin v. Supreme Court of Iowa, (No. 84-1641), pet. for cert. denied, ____ U.S. ____ (May 14, 1985), this Court rejected an attempt to seek certiorari from the IOWA Supreme Court's rule-making adoption of an IOLTA program. Terry v. Withrow, No. C85-1767 (N.D. Ohio filed June 21, 1985), filed by an attorney, was dismissed for lack of standing.

improve the justice system. Second, there is no merit to the IOLTA opponents' taking claim.

This Court's multifactor balancing test [Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)], which examines taking claims by looking to the character of the governmental action and the economic impact of that action on the claimant, and particularly, the extent to which the action has interfered with distinct investment-backed expectations, leads to the inevitable conclusion that IOLTA programs do not take the client's property. Indeed, where the claimant's property is not otherwise impacted, loss of future profits will not support a taking claim. Andrus v. Allard, 444 U.S. 51 (1979). Or as Justice Peckham put it, if a claimant is "not injured to the extent of a penny . . . his abstract rights are

unimportant." Hooker v. Burr, 194 U.S. 415, 419 (1904).

Because established taking doctrine requires at least some loss, and because petitioners can point to no loss from the operation of California's IOLTA program, their claim is not well-founded and does not merit review by this Court.

B. The IOLTA Premise. In upholding California's IOLTA program, the California Court of Appeal, like the 32 state supreme courts which have approved similar programs, recognized that IOLTA combines lawyer trust account mandates, economic realities, and banking law restrictions, to produce net income where, previously, there was no net income.

IOLTA is simplicity itself. Attorneys routinely receive funds in trust for future transactions. If the funds are large in amount or expected to be held

for a long time, the attorney customarily deposits the funds in an interest-bearing account for the benefit of the client. IOLTA does not change this time-honored practice.

Often, however, lawyers hold clients' money in amounts which are very small or expected to be held for a very short period of time, making it impracticable and uneconomical to invest the money productively for the client.[3] As a result, no interest is earned on these pooled accounts. Only the lawyer's fi-

---

3. The wide range of costs that lawyers incur include (1) the time to determine whether investment is warranted, (2) the time to obtain tax identification information, (3) the time to open a separate, income producing account, (4) law firm bookkeeping on a periodic basis, (5) preparation on tax reporting forms, and (6) the time required to close a separate, income producing account. A.B.A. Task Force and Advisory Board on Interest on Lawyer Trust Accounts, Report to the Board of Governors, 22-24 (July 1982).

nancial institution benefits. Under IOLTA, all the inherently unproductive client deposits are pooled in an interest-bearing NOW account. The clients lose nothing. The interest earned only because of IOLTA is used to support law-related public services.

A few brief examples of the essentially nonproductive funds one would expect to find in an attorney's trust account wi'l demonstrate why no client is injured, even to the extent of a penny.

1. **Cost Deposits**. A client involved in litigation is often required to provide costs in advance. In entrusting funds to the lawyer for the payment of costs, the client has no expectation of having the funds returned (although excess advances will be returned) nor any expectation of earning interest. The fact pattern in Glaeser v. The Florida

Bar, No. 84-1345 (M.D. Fla. filed Oct. 11, 1984) is typical. There the client gave her attorneys a $100 cost deposit. At the time of receipt, the small size of the deposit, as well as the expectation that the funds would be promptly disbursed, did not justify an effort to invest the funds. After disbursement, the small amount left over, $13.75, also did not justify investment. Indeed, as a practical matter, $13.75 is inherently incapable of being put to productive use for an individual. The approximately 6¢ per month in earnings, at NOW account rates, would not offset bank service charges, let alone the costs incurred by attorneys to administer a separate interest-bearing account.

2. **Real Estate Escrows.** An attorney, representing the seller of a small piece of property, receives $500 to be

held in escrow. At closing, some thirty to sixty days later, the deposit is applied to the sales price. If closing does not take place, depending on the sales contract and other factors, either the buyer or seller may be entitled to the deposit. The interest on the deposit, $2.19 per month, would not justify the expense required to negotiate provisions relating to the payment of interest or to set up a separate NOW account.

3. **Personal Injury Settlements.** Settlements come from insurance companies in the form of checks or drafts. Banks customarily indicate a time period in which it is safe to assume that the insurance company has "accepted" the draft or the check has cleared, but in fact the credit to the lawyer's trust account may occur sooner. In addition, there are a number of circumstances under which mon-

ies from the check or draft may stay in the account for days after disbursements are made. For example, assume $50,000 is received by an attorney on a Monday. The lawyer's trust account check is mailed to the client that day. It is received and deposited by the client on Wednesday. It clears the lawyer's bank on Friday. Everything has proceeded expeditiously, more expeditiously than likely. Does the client have any expectation of receiving interest on the settlement amount during the four day "float" period? Clearly not. Yet, if the attorney's trust account were an IOLTA NOW account, some $28.76 would have been earned.

4. **Real Estate Closings**. In many instances, real estate closings are done in law offices. The attorney may receive the funds by wire a day in advance, thereby producing a one day accrual of

interest. Or, the closing may be unexpectedly delayed for a day or two to clear last minute problems. As with personal injury settlements, disbursement checks will not clear instantly. The short term float will produce interest that cannot be apportioned in any rational way. Before IOLTA, only banks benefited from the float. Now, the public shares in the benefit.

C. Lack of a Substantial Constitutional Question. If customary trust rules are applied to attorney trust accounts, a client has no claim to interest earned in situations where the interest earned does not exceed the administrative costs incurred. IOLTA operates on that very real state of facts. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) does not preclude the IOLTA's proponent's calculus that recog-

nizes the real cost of producing net income. If IOLTA is a taking, only banks, not clients, will benefit.

No substantial constitutional questions have emerged in any state with an IOLTA program. The rationale utilized by the Court below, as well as the reasons offered in support of IOLTA programs by the seven states with reported opinions, are fully consistent with this Court's taking jurisprudence.

CONCLUSION

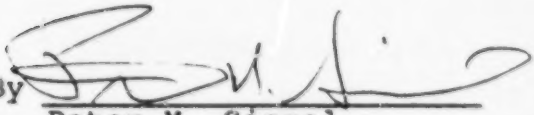
For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

* PETER M. SIEGEL
ARTHUR J. ENGLAND, JR.
RANDALL C. BERG, JR.

FLORIDA JUSTICE INSTITUTE
1400 AmeriFirst Building
One Southeast Third Ave.
Miami, Florida 33131
(305) 358-2081

ATTORNEYS FOR AMICI CURIAE

By 
Peter M. Siegel

* Counsel of Record, Member of the Bar of the Court

NO. 85-169

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

DAVID L. CHAPMAN, et al,

Petitioners,

vs.

THE STATE BAR OF CALIFORNIA, et al,

Respondents.

CERTIFICATE OF SERVICE

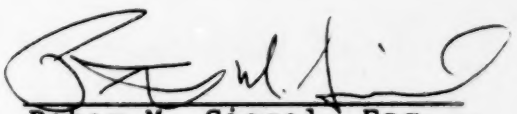
I hereby certify that I am a member of the bar of this Court and that, in accordance with Rule 28.3, I have served three copies of the annexed Brief in Opposition to the Granting of a Writ of Certiorari on the attorneys of record by placing a copy in the United States mail, first class mail, postage prepaid, addressed as follows:

Barbara E. Roberts, Esq.
David L. Chapman, Esq.
673 West Naomi Avenue
Arcadia, California 91006
Attorney for Petitioners

Herbert M. Rosenthal, Esq.
Larry Yee, Esq.
555 Franklin Street
San Francisco, California 94102
Attorney for Respondent,
The State Bar of California

Robert Cohen, Esq.
Legal Aid Society of Orange County
2700 Main Street
Santa Ana, California 92701
Attorney for Respondent, California Legislative Council of Older Americans

All parties required to be served have been served. Done this 29th day of August, 1985.



Peter M. Siegel, Esq.